

THE LEGALITY AND EFFICACY OF LINE-ITEM VETO PROPOSALS

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WEDNESDAY, MAY 26, 2010

U.S. SENATE,
SUBCOMMITTEE ON THE CONSTITUTION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 10:05 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Russell D. Feingold, Chairman of the Subcommittee, presiding.

Present: Senators Feingold and Whitehouse.

OPENING STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Chairman FEINGOLD. I call the Committee to order. Good morning. Welcome to this hearing of the Constitution Subcommittee. This morning, the Subcommittee will review the legality and efficacy of expedited rescission proposals, which are more commonly referred to as "line-item veto proposals."

Every year since I was first elected to the U.S. Senate, I have held listening sessions in each of Wisconsin's 72 counties. I have held over 1,200 of them so far, and I have heard from tens of thousands of people across the State. And while over those many years health care reform has been the top issue discussed at these listening sessions, the need to rein in wasteful spending, and especially wasteful earmark spending, has been raised consistently. And it has never been a more urgent issue.

That is why it was especially encouraging to have the President come forward just 2 days ago with his own proposal for an expedited rescission, or line-item veto, measure.

When he took office, President Obama was handed perhaps the worst economic and fiscal mess facing any administration since Franklin Roosevelt took office in 1933. The legacy President Obama inherited poses a gigantic challenge.

There is no magic bullet that will solve all our budget problems. Congress has to make some tough decisions, and there will be no avoiding them if we are to get our fiscal house in order. But we can take some steps that will help Congress make the right decisions and that can sustain the progress we make.

A line-item veto, properly structured and respectful of the constitutionally central role Congress plays, can help us get back on track. And that is what we will explore in today's hearing.

I have advocated for giving the President expedited rescission, or line-item veto, authority for a long time. Over the past two Con-

gresses, I have been pleased to join with my colleague from Wisconsin, Congressman Paul Ryan, the Ranking Member of the House Budget Committee, in offering a proposal that specifically targets earmark spending. He and I have worked on this issue for several years. While we belong to different political parties and differ on many issues, we do share at least two things in common: our hometown of Janesville, Wisconsin, and an abiding respect for Wisconsin's tradition of fiscal responsibility.

Now, among the many members who have joined us in that particular effort is the Ranking Member of this Subcommittee, the Senator from Oklahoma, Dr. Tom Coburn. I am delighted to have Senator Coburn as a cosponsor of our bill. There is no more energetic foe of wasteful earmark spending, and I have been pleased to work with him on a number of different efforts to rein in that practice.

At this time I would ask that Senator Coburn's statement be placed in the record, without objection.

[The prepared statement of Senator Coburn appears as a submission for the record.]

Chairman FEINGOLD. There have been a number of line-item veto proposals offered in the past several years. But the measure we proposed is unique in that it specifically targets the very items that every line-item veto proponent cites when promoting a particular measure, namely earmarks.

When President Bush asked for this kind of authority, the examples he gave when citing wasteful spending he wanted to target were Congressional earmarks. When members of the House or Senate tout a new line-item veto authority to go after Government waste, the examples they typically give are Congressional earmarks. When editorial pages argue for a new line-item veto, they, too, cite Congressional earmarks as the reason for granting the President this new authority.

While we have made some progress on earmarks, they continue to be a serious problem. By one estimate, in 2004 alone more than \$50 billion in earmarks were passed. Just last year, the Omnibus Appropriations bill for fiscal year 2009, which passed in March of 2009, contained more than 8,000 earmarks costing \$7 billion. And the Consolidated Appropriations bill for fiscal year 2010, which passed in December, included nearly 5,000 earmarks, costing \$3.7 billion.

There is no excuse for a system that allows that kind of wasteful spending year after year, and while I have opposed granting the President line-item veto authority to effectively reshape programs like Medicare and Medicaid, for this specific category, I support giving the President this additional tool.

Under the bill Congressman Ryan and I proposed, wasteful spending would have nowhere to hide. It will be out in the open so that both Congress and the President have a chance to get rid of wasteful projects before they begin. I invited my colleague from Wisconsin to testify today, but unfortunately, his schedule does not permit him to be with us in person. He will submit written testimony, and we will include that in the hearing record.

Of course, there are other expedited rescission or line-item veto ideas that have merit as well. The Senator from Delaware, Senator

Carper, who will lead off our hearing today, has a proposal, which he may wish to discuss. I have been proud to work with Senator Carper on a number of critical budget issues, including the restoration of the PAYGO budget rule which was so central to our ability to balance the government's books during the 1990's. He has been a true champion of taxpayers, and his work in this area is another example of that leadership.

And then there is the President's expedited rescission, or line-item veto, proposal that Senator Carper and I will be introducing shortly. We are pleased to have Jeffrey Liebman from the Office of Management and Budget with us today to discuss the President's proposal, which is an exciting and important development. The President's approach includes most of what Congressman Ryan and I have targeted and I believe what Senator Carper targets in his measure as well.

While we seek to find ways to support our goal of cutting wasteful spending, it is essential that any new budget tools we create be constitutional. That is part of the core mission of this Subcommittee, and to help us in this regard, we are privileged to have a distinguished Washington attorney and former Assistant Attorney General for the Office of Legal Counsel under President Reagan, Charles J. Cooper.

Helping us assess the potential value a line-item veto might bring to budget discipline is another of today's witnesses, Ryan Alexander, from Taxpayers for Common Sense, a respected budget watchdog group. Finally, joining Mr. Cooper and Ms. Alexander on the third panel will be Alison Fraser from the Heritage Foundation.

I look forward to an open dialog on these important questions, and I thank the witnesses for the time they have devoted and the effort they have made to be here with us today.

At this point, of course, I would normally turn to the Ranking Member, who cannot be here today. He is tied up in another important meeting about our debt crisis. But I again want to thank Senator Coburn for his cooperation in organizing this hearing.

So we will start off this morning by hearing from Senator Tom Carper. Senator Carper, thank you so much for agreeing to testify at today's hearing. You have been a long-time ally on budget issues. We have worked together on a number of different proposals to combat government deficits and rein in other fiscally irresponsible practices. Senator Carper's expedited rescissions bill, the Budget Enforcement Legislative Tool Act, or BELT Act, would significantly enhance the President's ability to eliminate earmarks and other discretionary spending. And I am delighted to be joined by Senator Carper in introducing the President's expedited rescissions, or line-item veto, proposal.

Senator, thank you for taking the time from your busy schedule to be here today. I look forward to hearing from you, and you may proceed.

**STATEMENT OF HON. THOMAS R. CARPER, A U.S. SENATOR
FROM THE STATE OF DELAWARE**

Senator CARPER. Mr. Chairman, thank you so much. It is great to be with you. It seems like a month or two ago when you were

good enough to come and testify before a Subcommittee that I chair on the Homeland Security and Governmental Affairs, which has a big, long title, but it is really a Subcommittee that focuses on waste, wasteful spending, inefficient spending. And we appreciated very much hearing from you that day on providing another tool in the toolbox for, in this case, the President to rein in wasteful spending, and I am just delighted that we are going to be able to work together going forward in this venue.

If we look at our budget deficit that we face, from the years 2001 to 2008 we racked up as much new debt in those 8 years as we did in, I think, the previous 208 years of our Nation's history. Just in 8 years, doubled our Nation's debt. We are on course right now, if we do not do something about it, to double our Nation's debt again by the end of this decade. We have seen from what is going on in Greece and in Europe that that path is not sustainable, and it is important that we diverge from it as quickly as possible.

When Barack Obama was a mere mortal and he was one of us—still one of us. In fact, his last day as a U.S. Senator, he had been elected President, but he gave a farewell address on the floor of the Senate. I was there. A number of our colleagues were there because we thought, well, this could be historic. It turned out, I think, it was. And when he finished his address, I had been writing down literally on the back of an envelope about six or seven or eight ideas that his administration might find helpful in terms of reining in deficit spending.

Among the things that I wrote down were cost overruns in major weapons systems were up to about \$300 billion per year by 2008. I wrote down tax gap, the tax gap, the amount of money that is owed to the Treasury not being collected, roughly \$300 billion per year. I wrote down the idea of sort of like replicating the Greenspan Commission back in 1982 for trying to address Social Security.

On that list was improper payments. We make tens of billions of dollars of improper payments, the Federal Government does, mostly overpayments. And I wrote down recovering monies that had been misspent, fraudulent spent, going out and recovering that money, not just saying, well, we will just scratch that off or wipe that off, but going out and getting the money.

I wrote down the list surplus property. We have all this surplus property, thousands, tens of thousands of pieces of property, many of which we do not use, but we pay utilities for them, security for them, and it is just a waste of spending.

I wrote those down, and before he left the floor, he was over talking with a page and shaking hands with all the pages. They wanted to shake the hand of a future President. And I stood in line with the pages. When he came to the end of the line, he reached out to shake my hand, and he said, "You are kind of big for a page." And I said, "Mr. President," and we walked off the floor together. I gave him my envelope, and I said, "I think these are eight pretty good ideas for reducing budget deficits, and obviously you are going to inherit a big one." I did not know how big it was going to be. But I am pleased to say that if you look at some of the things that this administration is doing with respect to going after major weapons systems' cost overruns, F-22s, C-17s—which is not a cost overrun,

but just an airplane we have plenty of and do not need more—tax gap, deficit commission, surplus properties, improper payments, post-audit cost recovery efforts. He was really going down the list. He said to me when he took my list, he said, “You know, I cannot read your writing.” And I said, “Well, we will put it in a form that you can read,” and later I gave it to him.

I do not know what ever happened to that list, but I am delighted to say that when we watch what this administration is doing, a lot of the things that were on that list they are actually doing. One of the things on the list was statutory line-item veto power, something that our Chairman has supported for a number of years, something I have supported literally since 1992. As a House member, I offered legislation. I called it a 2-year test drive for line-item veto power for the President, where the President could rescind as much as 100 percent of spending. He would have the power for 2 years. Congress could override it with a simple majority in either the House or the Senate. It did not affect entitlement programs, did not affect taxes, but the idea was to really do a test drive for 2 years with something like line-item veto power for the President. Then if after 2 years the President abused the powers, they would go away. If he did not abuse the powers and it was actually effective, we could extend it for another 2, 4, 8 years, or make it permanent.

When I came to the Senate, George Voinovich and I a couple years ago introduced a version of the same bill, and we now have, I think, over 20 cosponsors, and I am very pleased that the administration has come and met with us, as I am sure they have with Senator Feingold and his staff, but just to say, “What do you think we ought to do?” and to take ideas from our bill, as I am sure they have from your bill. Today we are going to be marrying our fortunes together.

When I was Governor for 8 years, we had line-item veto power, and it was interesting. One of my former colleagues who was a Governor, he used to describe line-item veto power as having a bazooka under his desk. And he said, “It was a bazooka I almost never had to use, but the legislature knew it was there. And if we could not talk them out of wasteful spending or inefficient spending, bad ideas,” he said, “then we would use the bazooka.”

I do not know that what we are talking about is a bazooka under the desk, but what it is, I think, is a very helpful tool for this Chief Executive to use, and I would suggest that we provide him the power, probably not forever but for maybe 4 years, do a test drive, see how it works. If it is abused, then it goes away. If it is effective or if we learn that it can maybe be more effective, then we have the opportunity maybe 4 years down the road to enhance it and to improve it.

I do know this: As much as I like the idea of silver bullets, I do not think there is one. I do not think there is one for reining in the budget deficit. Maybe if we had a magic wand and could sort of wave it, and all of a sudden GDP growth would be 10 percent a year for the next, you know, 50 years or even 10 years, I think that would pretty well wipe out the deficit.

Unfortunately, I do not have that magic wand, and neither do the rest of us. What we do have are a bunch of good ideas, and this

administration is beginning to implement a bunch of good ideas. And I think we have the opportunity here for us, for Senator Feingold and myself, and hopefully Senator Voinovich and Senator Coburn and others to join forces on another good idea, and that is, to give this President the opportunity to single out spending that does not make sense, that is inefficient, that is wasteful, and require us to vote on it. We can vote it—if a majority of us think that, no, that is reasonable spending, that is a good one, that is a good idea, then so be it. But I have always said on an idea of mine, if I cannot get 50 of my colleagues to vote with me for it in the U.S. Senate, then maybe we should not be spending that money. And I think that pertains to ideas of almost all of us.

So, Mr. Chairman, I am delighted to be here with you before your Committee. I am very much looking forward to working with you and your team as we put together a bipartisan coalition around this idea, and with the support of the President, actually enact it this time.

Chairman FEINGOLD. Senator, thank you. I think this will be not only a terrific opportunity for us to work together on something we both care a lot about, but as I think you said yesterday, this is really a time when maybe the stars are aligned and we can actually get this done.

I was struck by your comments about your experience as Governor with the line-item veto, because in Wisconsin, we had the most, if you will, extreme line-item veto where the Governor was able basically to use a computer and move numbers and letters around in a way that actually made the people of the State kind of squeamish about a line-item veto and fearful of it, and we had to modify it.

Senator CARPER. That is a couple of bazookas.

[Laughter.]

Chairman FEINGOLD. And it was called the King George III veto.

So what I am struck by, Senator, is how popular this idea is even in that context, because I, of course, reassure people this is not what this is. This is a much more narrow, targeted technique. So I really appreciate your testimony. Thank you.

Senator CARPER. It is my pleasure. Thanks so much. We look forward to it.

Chairman FEINGOLD. Now I will turn to the testimony from the Office of Management and Budget. Mr. Liebman, will you please stand and raise your right hand to be sworn in as soon as you are up there?

Do you swear or affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. Liebman. I do.

Chairman FEINGOLD. Thank you. You may be seated.

Our first witness on this panel is Jeffrey Liebman, the Acting Deputy Director of OMB, where he has served as executive associate and chief economist. Mr. Liebman is a renowned economist and is currently on leave from Harvard University's Kennedy School of Government, where he teaches courses on U.S. economic policy and public sector economics. Mr. Liebman previously served

in the Clinton administration as a Special Assistant to the President for Economic Policy at the National Economic Council.

Sir, we appreciate you being here today and look forward to hearing more about the administration's proposal, and you may proceed.

STATEMENT OF JEFFREY B. LIEBMAN, ACTING DEPUTY DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET, WASHINGTON, DC

Mr. LIEBMAN. Thank you, Chairman Feingold, for inviting me to testify today about the President's new proposal, the Reduce Unnecessary Spending Act of 2010. And I also want to thank Senator Carper for his leadership on this issue.

This legislation would create an expedited procedure that guarantees an up-or-down vote on certain rescissions proposed by the President, helping to eliminate unnecessary spending and discouraging waste in the first place.

Since taking office, the administration has made a priority of identifying and cutting wasteful spending, proposing approximately \$20 billion of terminations, reductions, and savings in both the fiscal year 2010 and fiscal year 2011 budget proposals. While recent administrations have seen between 15 and 20 percent of their proposed discretionary cuts enacted, we were pleased to work with Congress last year to succeed in achieving 60 percent of the discretionary cuts that the President proposed in his budget. So for that, I thank you and your colleagues.

Further, the administration has worked with Congress to curb earmarks, and the appropriations bills for this year saw a significant decline in earmarks—a drop of 17 percent in number and 27 percent in dollar value over the previous year. These reductions build on the progress that Congress has made on earmarks since 2006; reductions prompted by a series of reforms that then Senator Obama helped to write with Senator Coburn and others, which helped to bring more transparency and disclosure to the process.

In this year's budget, the administration also committed to restraining spending more broadly and has proposed a 3-year freeze on non-security discretionary funding, saving \$250 billion over 10 years compared to what would happen if this spending grew with inflation over that time period. This spending restraint complements other measures in the budget that, together, produce more deficit reduction than has been proposed by any President's budget in over a decade.

Furthermore, the administration proposed, and Congress enacted, statutory pay-as-you-go legislation. PAYGO forces us to live under a very important planning—that the Federal Government can only spend a dollar on entitlement programs or pass a tax cut if it saves a dollar elsewhere, and this encourages the kinds of tough choices that are going to be critical to putting our country back on a path toward fiscal sustainability.

Significant progress has been made on cutting unnecessary spending, including earmarks, but more can be done. The President's proposal for expedited rescission would create an important tool for reducing such spending. In short, the bill would provide the President with additional authority to propose a package of rescis-

sions that would then receive expedited consideration in Congress and a guaranteed up-or-down vote.

Here is how it works.

Under this new authority, the President can propose fast-track consideration of rescissions of discretionary and non-entitlement mandatory spending. The President is limited to proposing changes that reduce funding levels and cannot use this authority to propose any other changes to law. The fast-track process is thus limited only to reducing or eliminating funding, for which a straight up-or-down vote is desirable.

After enactment of funding, the President has 45 days during which Congress is in session to decide whether to submit a rescission package using this expedited procedure.

A rescission package submitted under this authority receives fast-track consideration in Congress. Debate is limited in both Houses, and the package is guaranteed an up-or-down vote without amendment. From the package's introduction to the final vote, the process can take no more than 25 days.

Following submission of a rescission request using this expedited procedure, the President may withhold funding for up to 25 days, after which the funding must be released. This ensures that agencies do not obligate funds before Congress has had an opportunity to consider the rescission package.

The proposal has been crafted to preserve the constitutional balance of power between the President and Congress. Under our proposal, Congress, which is empowered to set its own rules, changes those rules under which it considers rescission packages submitted by the President—using well-established fast-track procedures. Rescissions can only occur if Congress enacts them into law. In other words, our proposal does not expand the Presidential veto authority in any way.

A number of members from both parties, including the Chairman and Senator Carper who testified on the first panel, have introduced proposals that would, like our proposal, target unnecessary spending by fast-tracking consideration of rescissions. We applaud these efforts, and we look forward to working with Congress to resolve any remaining differences and enact this authority into law.

Thank you.

[The prepared statement of Mr. Liebman appears as a submission for the record.]

Chairman FEINGOLD. Thank you so much. Let me just ask you a few questions.

I want to start by asking you about the practical impact of the proposal you have laid out. Could you give me some examples of the type of unnecessary spending and wasteful programs you are hoping that this proposal will end? How much money do you think something like this could save U.S. taxpayers?

Mr. LIEBMAN. Yes, thank you, Senator. I think there are several types of spending that this proposal could be effective in targeting. One type of spending are programs that are heavily earmarked or allocated on methods other than merit-based or competitively based methods of allocating spending. And so the President in his budget has proposed ending several categories of programs of this sort.

For example, there are State assistance grants for water infrastructure at the EPA, where we spend \$157 million on a heavily earmarked program, and we have other programs where we address similar needs in competitive and merit-based ways. Similarly, there are earmarked surface transportation programs at the Department of Transportation. We spend \$293 million on those programs, and, again, there are other ways to meet our surface transportation needs where the allocation is merit-based. So heavily earmarked programs is one example.

The other category of programs where I think we can achieve real savings from this are in duplicative programs. For example, we have programs at both the Department of Commerce and at the USDA that are supposed to fund public broadcasting, but we have also very effective programming through the Corporation for Public Broadcasting, and going after that kind of duplicative program could also be accomplished by this spending.

In terms of the total magnitude, the President last year and this year proposed about \$20 billion in this category of spending. You know, we achieved some of that working through the normal appropriations process. I think with this tool we could achieve a lot more of it. This comes back to something that was said in the opening remarks. It is not simply reducing spending after it has occurred that will be able to reduce the deficit through this approach; it is also discouraging people from proposing these things in the first place. And, really, I think that is probably the biggest impact of this proposal.

Chairman FEINGOLD. I agree with you that the deterrent effect is probably the most effective aspect of it.

As you note, the President's proposal focuses only on rescissions of discretionary spending and on non-entitlement mandatory spending. It does not cover entitlement programs or tax expenditures of any kind.

Now, I strongly believe that enacting a line-item veto measure for this sort of discretionary earmarked spending would be very significant on its own, but some critics might contend that our major fiscal challenges stem in large part from entitlements and tax expenditures.

What would you say to those who want to include entitlements and tax expenditures in this kind of an expedited rescissions or line-item veto bill?

Mr. LIEBMAN. I think the answer to that very good question, Senator, is that this particular tool aims to be a very streamlined tool for letting us, you know, within weeks after discretionary or non-entitlement mandatory spending is enacted to go after wasteful programs. And the idea here, in order to keep it streamlined and very transparent, is to permit only a very simple thing to happen, which is spending levels for these programs to be reduced or eliminated altogether. And, in particular, the President's proposal does not allow any amendments to the proposal. It is just a matter of reducing dollar amounts.

When one makes changes to tax or to entitlement programs, one typically needs to make statutory changes as part of that legislation because these programs are complicated, they interact with each other, and it is typically not the case that one can make a

change to those programs in a simple sort of yes-or-no, up-or-down approach. And so we do not think this kind of streamlined simple approach matches well with those needs.

But it is absolutely the case that if we were going to get control over the country's budget situation, we are going to have to continue to make progress not simply on the discretionary side, but on the entitlement side, on the tax expenditure side. And as you know, the President worked very hard to the largest fiscal challenge, controlling health care costs, right from the beginning of the administration, and he has proposed the bipartisan fiscal commission as a way to work on these bigger programs. So I think we need different tools for different tasks, and this is not a silver bullet at all, as Senator Carper said. This is just a way to go after one particular and very important aspect of the spending challenge we face.

Chairman FEINGOLD. The legislation I introduced with Congressman Ryan requires that any savings realized from a line-item veto be used to reduce our budget deficits. Is there a reason that feature was not included in the President's proposal? And do you have any objection to including it?

Mr. LIEBMAN. That is a good question. Under the rescission proposal from the President, only one thing can happen: spending can get reduced. There is no way to reallocate spending to other programs. There is no other way to introduce new spending into it. In the President's proposal, the direct effect is simply to reduce spending and reduce the deficit. But as you note, other proposals have gone a step further and have said that the discretionary spending allocation should be reduced by the amount of the rescissions, and we did not do that in this proposal because we think, although in many, and maybe even most cases, what one will want to happen when spending is eliminated through a rescission is to reduce the deficit and not to have that spending replaced with another program. In other cases, what may happen is that there may be ineffective programs targeting a real need where Congress wants to eliminate those ineffective programs, and then they want to come back later in the session and try to address that need with a more effective merit-based approach. So in drafting this proposal, we left that flexibility.

That said, there are many features of this proposal, including this one, where we would be very happy to work with you and figure out whether we got it right.

Chairman FEINGOLD. So you do not necessarily object to tying that down a little more tightly.

Mr. LIEBMAN. No. We would be happy to work with you on that.

Chairman FEINGOLD. Thank you. As I understand it, the administration's proposal gives the President up to 45 session days after enactment of a spending bill to send a proposed package of rescissions to Congress, and depending on the time of year, as you well know, that could end up being 3 months or even longer. Does the administration really need that much time to review an appropriations bill and submit proposed rescissions? Could you live instead with 30 calendar days, as I previously proposed in my legislation?

Mr. LIEBMAN. The key goal of this provision and one of the main differences with the existing Impoundment Control Act is that it requires a rapid submission by the President, that it has to be done

within 45 days, unlike the existing rescission authority where submissions can be delayed much later. And the reason we chose 45 days is that at the end of the year, in December or January, frequently there are large omnibus appropriations bills exactly at the same time that we are putting together the President's budget. And so if one gets one of these huge bills and we need the time to go through it and figure out exactly what is in it, do the analysis of the policy and figure out which things need rescissions, we thought that something like 45 days might well be what is needed at that period. Most times of the year, on smaller, more traditional appropriation vehicles, 45 days is longer than one needs.

We decided to go simple and just have a single number of days, but one could perhaps have 45 days only for things passed in December or January in an omnibus procedure and a shorter time period on other ones.

Chairman FEINGOLD. It sounds like something we could work out.

Mr. LIEBMAN. Absolutely.

Chairman FEINGOLD. Thank you.

I now want to ask you about the specific procedures governing Congressional consideration of the rescissions package. Correct me if I am wrong, but it appears that the House could avoid a direct vote on the rescissions package itself by defeating the motion to proceed to it. By contrast, the proposal for consideration by the Senate ensures that the rescissions package comes to the floor for debate and a vote.

Why is the process structured the way it is in the House? Is there some quirk of House procedure that makes that necessary?

Mr. LIEBMAN. Well, fundamentally, the Constitution empowers each chamber of Congress to set its own rules, and so this procedure tries to respect that, and we tried to write a procedure that was consistent with the culture in each House of Congress. But, frankly, that is something we would be very happy to work with you on and figure out what procedures work best. Our goal here is quite simple. We want to have an up-or-down vote. We want the President to have to introduce something quickly. We want there to be no amendments. And the details around that are all things that I think we can work together to get right.

Chairman FEINGOLD. For the deterrent effect on this to work, you and I both discussed the need for a substantive vote where somebody has to own keeping these expenditures important. It occurs to me that we do not want to have somebody have the excuse that they simply wanted to proceed to something else.

Mr. LIEBMAN. That is a good point.

Chairman FEINGOLD. Thank you for that candid response.

Finally, I want you to know—and this is more of a comment for your reaction—that I will be pushing hard to pass the line-item veto as the President has proposed. You and I both know it will be an uphill struggle, so we will need the full support of the administration. So I hope you will take that request back with you.

But I also have another request to pass on, and that is that the administration not wait until it has the line-item veto to aggressively challenge wasteful spending and unjustified earmarks. You

have already mentioned some of the things that the administration has already done in this regard, and I congratulate you on that.

Let me say this: The next time Congress sends you a massive spending bill, stuffed with over 8,000 earmarks totaling more than \$7 billion, like last year's omnibus, I hope the President vetoes it and tells Congress to try again. Your reaction?

Mr. LIEBMAN. Well, I thank you for that advice. I think one of the reasons, clearly, why this particular authority is needed is that the veto pen is a very blunt instrument, and as you well know, one often gets a bill where 90 percent of it is essential, and then there is 10 percent that you wish were not there, and it makes it very difficult to get rid of the wasteful spending.

And so, you know, I do hope we will continue to be successful in this year's appropriation process as we were in last year's appropriation process in going after wasteful spending, and I will certainly take your message back, and thank you very much.

Chairman FEINGOLD. Thank you, Mr. Liebman, for your excellent testimony. I look forward to working with you on this.

Mr. LIEBMAN. Thank you.

Chairman FEINGOLD. We will now turn to testimony from our third panel of witnesses. Will you all please stand and raise your right hand to be sworn in? Do you swear or affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. COOPER. I do.

Ms. ALEXANDER. I do.

Ms. FRASER. I do.

Chairman FEINGOLD. Thank you. You may be seated. Welcome to all of you. Thanks for being with us here this morning. I am extremely impressed with the caliber of the witnesses on this panel. I look forward to hearing from all of you. I ask that each of you limit your remarks to 5 minutes. As always, your full written statements will be included in the record.

Our first witness on this panel is Charles Cooper, a constitutional scholar and expert on line-item veto proposals. Mr. Cooper served as Assistant Attorney General in the Office of Legal Counsel in the Reagan administration and had, I am told, the unfortunate and unenviable task of telling President Reagan that there is no legal or constitutional support for an inherent line-item veto. Mr. Cooper is one of the lawyers who was retained by several Members of Congress to challenge the constitutionality of the Line Item Veto Act of 1996 and is, therefore, uniquely suited to discuss how the 1996 Act is different from the legislative proposals we are talking about today.

Mr. Cooper has over 25 years of legal experience in Government and private practice. He was named by the National Law Journal as one of the ten best civil litigators in Washington. He is a graduate of the University of Alabama Law School and is a founding member and Chairman of the law firm of Cooper & Kirk where his practice is concentrated in the areas of constitutional, commercial, and civil rights litigation.

So, Mr. Cooper, thank you so much for being here today, and you may proceed.

**STATEMENT OF CHARLES J. COOPER, PARTNER, COOPER &
KIRK, PLLC, WASHINGTON, DC**

Mr. COOPER. Thank you very much, Mr. Chairman. I very much appreciate the Committee's invitation to me to present my views on the constitutionality of the recently proposed measures designed to give the President an authority akin to a line-item veto.

The analysis of the constitutionality of the various line-item veto measures that have been proposed is controlled by the Supreme Court's decision in *Clinton v. City of New York*, which struck down the Line Item Veto Act of 1996. That Act provided that the President may cancel any dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit by sending Congress a special message within 5 days after signing a bill containing such items. Cancellation took effect when the Congress received the special message.

The term "cancel" was defined by that Act as "to rescind" and to "prevent...from having legal force or effect," which made it clear that the President's action would be both permanent and irreversible. Thus, a Presidential cancellation under the 1996 Act extinguished the canceled provision, as though it had been formally repealed by an act of Congress. And neither the President who canceled the provision nor any successor President could exercise the authority that the provision, before the cancellation, had granted. It could be restored to the status of law only if a "disapproval bill" was enacted according to the bicameral passage and presentment requirements of Article I, Section 7.

In striking down the Line Item Veto Act of 1996, the Supreme Court in *Clinton* concluded that vesting the President with unilateral power to cancel a provision of duly enacted law could not be reconciled with the requirements established under Article I, Section 7; that is, bicameral passage and presentment to the President. The Court struck down the 1996 Act because—and these are the Court's words, Mr. Chairman—cancellations pursuant to the Line Item Veto Act are the functional equivalent of partial repeals of Acts of Congress that fail to satisfy Article I, Section 7.

The various measures that are now pending before this body for your consideration are very much in contrast to that Act. They are framed in careful obedience, I believe, to Article I, Section 7, and to the Supreme Court's teaching in *Clinton*. The President is not authorized by these bills to cancel any spending or tax provision or otherwise to prevent such a provision from having legal force and effect. Instead, the purpose of the proposed measures is simply to provide a fast-track procedure to require the Congress to vote up or down on rescissions that have been proposed by the President. In other words, the President's proposed rescissions are just that—proposals. Thus, any spending or tax provision duly enacted into law remains in full force and effect under all of these measures that I have seen unless and until it is repealed the old-fashioned way—by this body through bicameral passage and presentment.

To be sure, the current proposals—that I have seen, anyway—would authorize the President to temporarily defer or to suspend execution of the spending or the tax provision at issue for a single specified period of time. Now, the purpose of that deferral authority, obviously, is simply to allow the Congress adequate time to

consider the President's rescission proposals and vote them up or down before the funds at issue are obligated or spent. The President would be authorized to terminate the deferral, however, at any time that he determined that continuation of the deferral would not further the purposes of the Act.

So the President would be free at any time to change his mind—and that is critical—any time to change his mind about the deferred spending item or tax provision and to commit the funds. Likewise, if Congress does not approve the President's rescission proposal, the President would be required under the law to make the funds or tax benefits available no later than the end of the statutory deferral period—which, again, cannot exceed a single specified period of time.

Thus, the President is authorized only to defer a spending or tax provision under the proposal, not to cancel or otherwise prevent the provision from having legal force and effect. And the Congressional practice of vesting discretionary authority such as this in the President to defer and even to decline expenditure of Federal funds has been commonplace since the beginning of the Republic, and its constitutionality has never seriously been questioned and, in fact, was sustained and confirmed in the *Clinton* case itself.

So the short of my testimony, Mr. Chairman, is this: The Supreme Court's decision in *Clinton* recognizes and enforces the constitutional line established by Article I, Section 7, between the power to exercise discretion in making or unmaking a statute, which cannot be delegated to the President, and the power to exercise discretion in execution of the statute, which can be and has for centuries been delegated to the President. And, in my opinion, the provisions pending now before you, the one that you have introduced, the one that President Obama has just submitted earlier this week, seem to me to be on the constitutional side of that line.

Thank you again for inviting me to share my views with you, Chairman Feingold.

[The prepared statement of Mr. Cooper appears as a submission for the record.]

Chairman FEINGOLD. Thank you, Mr. Cooper, for your excellent testimony.

Our next witness is Ryan Alexander, the President of Taxpayers for Common Sense, an organization dedicated to making sure that the government spends taxpayer dollars in a responsible, transparent manner. A graduate of Wesleyan University and, I am pleased to note, of the University of Wisconsin Law School, Ms. Alexander has dedicated her career to the public sector and to halting government waste. She has been the President of Taxpayers for Common Sense for the last 4 years and has worked in some capacity for TCS for the last two decades. Prior to that, she served as Executive Director of the Common Cause Education Fund and co-founded the Appalachian Center for the Economy and the Environment. She also sits on the Board of Directors of the Project on Government Oversight.

Ms. Alexander, we welcome you, and thank you for taking the time to be here, and you may proceed.

**STATEMENT OF RYAN ALEXANDER, PRESIDENT, TAXPAYERS
FOR COMMON SENSE, WASHINGTON, DC**

Ms. ALEXANDER. Thank you. I am also a Wisconsin native, so I have that fiscal responsibility—

Chairman FEINGOLD. What town?

Ms. ALEXANDER. Thiensville. Thank you for the invitation to testify today. Taxpayers for Common Sense is an independent and non-partisan voice for taxpayers working to increase transparency and expose and eliminate wasteful and corrupt spending. As many people in this room know, we have created databases of all appropriation earmarks for the past 6 years. Our mission is to achieve a Government that spends taxpayer dollars responsibly and operates within its means. All of our work stems from our belief that no one—no matter where they find themselves on the map or the political spectrum—wants to see their money wasted.

TCS supports the Reduce Unnecessary Spending Act of 2010. It would establish a useful tool to cut wasteful spending without unconstitutionally impinging on Congress' power of the purse. The current appropriations process makes it difficult to cut unnecessary spending, as few Members of Congress will vote against entire appropriations bills because of individually wasteful earmarks or programs.

The President's proposal would increase transparency and accountability of the spending process by giving the public more information about where their elected representatives stand on specific requests that are often buried in omnibus spending or authorization bills.

Enactment of RUSA, for lack of a better acronym, would provide an opportunity for the administration and Congress to identify and cut duplicative or obsolete spending.

In 2006, TCS supported the Line Item Veto Act, in part because we found that the number of earmarks in appropriations bills had increased sixfold from 1998 to 2006. At the time, we argued that it would enable the President to shine a spotlight on specific spending and tax provisions. The same logic applies now: it is difficult to believe that majorities in both Houses of Congress would publicly support many of the current earmarks. The 2010 appropriations bills contain almost 9,500 earmarks worth almost \$16 billion. Especially at this time when there are so many demands for Federal dollars, it is hard to believe that those provisions would all be supported.

Congress has also become increasingly reliant on omnibus spending packages that wrap several appropriations bills together. The bills are thousands of pages long, frequently not available to the public for very long before they are voted on, and hide earmarks and other spending provisions.

At the same time, the general recognition—outside of Wisconsin—that Federal spending continues to grow at an unsustainable rate relative to revenue has led to a series of mostly insufficient attempts to rein it in. PAYGO rules, which require that any new funding be paid for without additional borrowing, include an exemption for emergency spending bills, which can often amount to tens or hundreds of billions in additional spending. Moreover, emergency spending bills routinely contain spending

that fails to meet Congress' own definition of "emergency" and are therefore often as likely as any spending bill to contain politically driven plus-ups, earmarks, or other spending. If Congress is indeed serious about the budget deficit, it should embrace all opportunities, including this legislation, to identify and cut unneeded spending.

Both voters and Congress would be well served by expedited rescission authority. Many times, lawmakers are asked to accept smaller spending proposals contained within broader legislation. Though relatively small in the context of a massive spending bill, these projects may become examples of Government waste that damages Congress' credibility with the public. In some cases, lawmakers have demonstrated the ability to eliminate wasteful spending after sufficient public attention. After many, many attempts, Congress did strip funding for the Bridge to Nowhere in subsequent legislation, and more recently the so-called Cornhusker Kickback was removed from the recent health care legislation. Expedited rescission authority will potentially enable Congress to eliminate these kinds of fiscal stains more quickly and decisively.

But there are other Bridges to Nowhere that pass through the appropriations process with very little public attention. Our hope is that this new process will help bring to light, reduce, and eliminate some of the more unnecessary spending proposals approved by Congress.

The principle that our tax dollars are too precious to be wasted is true even in times of surpluses and sustained economic growth. But the need to rein in wasteful spending takes on greater urgency in the face of the challenges we face today: the costs of wars in two theaters, growing costs of addressing domestic needs, and the threat of historically high deficit and debt levels. And while economists and politicians may disagree about the importance of reducing the deficit and the debt in times of high unemployment, no one advocates for the growth of deficit spending and increased borrowing to fund wasteful spending. Congress and the administration both need to take a hard look at the practices and options available to them to increase discipline in the spending arena. The Reduce Unnecessary Spending Act of 2010 would provide a tool for eliminating and curbing this wasteful spending, and we hope to see it enacted.

Thank you.

[The prepared statement of Ms. Alexander appears as a submission for the record.]

Chairman FEINGOLD. Thank you. I admire that you have devoted yourself to this issue, but it is not a big surprise because there is nowhere in Wisconsin where people like wasteful spending, but in Thiensville, they feel very, very strongly about that, as you well know.

Ms. ALEXANDER. I believe that. Yes.

Chairman FEINGOLD. Our final witness this morning is Alison Fraser, the director of the Thomas A. Roe Institute for Economic Policy Studies at the Heritage Foundation. Ms. Fraser oversees the Heritage Foundation's research on a range of domestic economic issues, including Federal spending, taxes, and long-term threats to our fiscal stability. Prior to joining Heritage, Ms. Fraser was the

deputy director of the Oklahoma Office of State Finance and the budget manager for Orange County, California.

Ms. Fraser, thank you for taking the time to testify today, and you may proceed.

**STATEMENT OF ALISON FRASER, DIRECTOR, THOMAS A. ROE
INSTITUTE FOR ECONOMIC POLICY STUDIES, THE HERITAGE
FOUNDATION, WASHINGTON, DC**

Ms. FRASER. Thank you very much. It is a pleasure to be here today. The views I express are my own and not those of the Heritage Foundation. I am an economist and not a lawyer, and as such, it is my view that any additional tool to restrain Federal spending that meets constitutional muster should be available. This is all the more important today with trillion dollar deficits that are nearly 10 percent of GDP, while the national debt is on track to double over the next decade, reaching nearly 90 percent of the economy, and 100 percent of GDP is sort of an international benchmark for approaching crisis. So I am truly concerned about the fiscal path that we are on.

Spending today is around 25 percent of GDP, and as you know, other than World War II, that has never happened. But unlike World War II, we really face a structural problem where spending will continue to track upwards as we move from recession-driven spending to entitlement-driven spending. And as we watch the fiscal contagion that started with Greece's budget crisis, spread across Europe and other countries, the concerns and attention to unsustainable Federal spending on our own shores have taken on crucial new urgency.

So toward that end, though existing rescission authority has been used by Presidents regularly until George W. Bush, one of my concerns about this is that it has not had a really material effect on spending. For example, of the \$43 trillion in Federal spending since 1990, Presidents have proposed rescinding around \$20 billion, of which Congress has approved just \$6 billion. So that is less than one one-hundredth of a percent of total Federal spending. To be sure, if President Bush had used this as other Presidents had, that number would have been a little bit higher, but not materially. And, of course, deterrence is something that is very, very difficult to measure, and that is certainly an important element to consider here.

But this Congressional Accountability and Line Item Veto Act and the President's proposal would make important changes to the existing authority that Presidents have—we have heard that before; let me just run through them quickly—by requiring to act, that is, I think, the most important one, requiring it on fast track, and an up-or-down vote. All of those I think are really important improvements to the existing authority. And they get closer to what Governors had. I worked for a Governor for 8 years, and he really used the veto pen and his line-item veto authority. It is an important tool.

This Act would focus on earmark spending, targeted tax benefits, and limited tariff benefits. These are all very important fiscal issues for Congress and the administration to focus on. However, my concern is that they do not add up to a lot of money. For exam-

ple, the numbers I am going to use, there are about 9,500 earmarks in all 2010 appropriations bills worth around \$16 billion. So even under this enhanced authority, if the President were to have proposed rescinding all of these earmarks, which is somewhat doubtful, discretionary spending, which is a small part of the budget, as we all know, would still have grown by 8 percent as opposed to 9 percent. And it is really hard to imagine a scenario where members would give up any, let alone all of their earmarks in a rescission package considering all of the negotiations, as you know, that go into appropriations bills in the first place. So my concern would like to have a much bigger effect.

I think one of the improvements—and you mentioned this with earlier witnesses—is we could have more impact if more spending categories were included, so I would like to see more broadly discretionary spending and even new entitlement spending that would increase over the baseline included.

To tackle the serious spending problems facing the Nation before they become a crisis, I really feel that stronger additional tools are necessary in addition to this legislative line-item veto. We heard no single bullet is going to solve the problem that we face, so let me quickly run through three additional tools that I would like Congress to consider.

The first is easy. It is budget transparency, adding in the unfunded obligations from Social Security and Medicare, which total \$43 trillion—a lot bigger than the current debt limit—would provide transparency for lawmakers and the public to see what our real long-term fiscal future is. I think that major policy changes should be scored over the long term in addition to the 5- and 10-year budget windows so that we can measure what their effect would be on our long-term fiscal sustainability.

And, finally, entitlements are not budgeted. They have no appropriations, and these three, the big three, are not even reauthorized on a regular basis like, say, the farm bill is. So I think this spending should be taken off of autopilot and put onto long-term, say 30-year budgets that are regularly re-evaluated and put entitlement and mandatory spending on an even playing field so that all priorities are debated on a regular basis, not just the smaller window of discretionary spending.

So, in short, I think that this is a useful tool. There are many more things that are going to be needed, and I welcome your comments, and thank you very much for the opportunity to talk to you today.

[The prepared statement of Ms. Fraser appears as a submission for the record.]

Chairman FEINGOLD. Ms. Fraser, thank you for your testimony. I certainly do not dispute that additional things need to be done. Of course, this is a hearing of the Senate Judiciary Constitution Subcommittee, and we are particularly addressing the issue that the previous line-item veto—which I did vote for—was struck down by the Supreme Court. But I am also a member of the Budget Committee, and I will take to heart your additional ideas.

Ms. FRASER. Thank you.

Chairman FEINGOLD. Thank you for your testimony.

Mr. Cooper, thank you for your very thorough written testimony and particularly for your summary of the history of the 1996 law and its journey through the courts. Understanding that background is very helpful to the analysis of the constitutionality of the current proposals, and many who are watching or will watch this hearing are not lawyers or legal scholars, let alone constitutional scholars. But they probably remember that the line-item veto that Congress passed in 1996 was struck down by the Supreme Court. I think you have done a very good job explaining why you think both the President's proposal and the bill that Congressman Ryan and I have introduced are constitutional.

Let me ask you, in addition, do you see any constitutional risk in explicitly requiring that any savings realized by this proposed new rescissions process be used only for deficit reduction? We might do that, for example, by requiring that the annual budget caps be adjusted down to reflect the reduced spending. Do you see any constitutional infirmity in that?

Mr. COOPER. I do not, Mr. Chairman. I will confess to you that I have not spent a lot of focused and concentrated thought and research on that particular question. But I do not see—

Chairman FEINGOLD. On the face of it, you do not—

Mr. COOPER [continuing]. On the face of it any reason why Congress limiting itself in that fashion would pose a constitutional difficulty.

Chairman FEINGOLD. Thank you, sir.

Ms. Alexander, let me turn to you. As I noted in my questioning of Mr. Liebman, the administration's bill does not include the same requirement that the rescissions be used to reduce the deficit. Would you support an effort to include such a requirement?

Ms. ALEXANDER. Yes, we would support—TCS has supported your proposal in the past, and we would support that as an amendment to the President's proposal.

Chairman FEINGOLD. Any other changes you would consider making to the President's proposal to cut back on Government waste?

Ms. ALEXANDER. I would say based on your questions, your back-and-forth with Mr. Liebman, I think we also agree that a faster timeframe would be helpful.

Chairman FEINGOLD. In terms of sessions days and—

Ms. ALEXANDER. In terms of session days, and while I am sensitive to the concern he raised of omnibus spending bills and the budget happening at the same time, it would also just be helpful to not just push all the omnibus CRs to the end of the year. So there are other solutions.

Chairman FEINGOLD. Very good.

Ms. Fraser indicated—I agree with you—that the line-item veto is definitely not going to solve all of our budget problems, but I think it can be used to shine a light on wasteful programs or at a minimum to help dial down spending in accounts that have grown too large over time.

Even if we did not broaden the President's proposal in the way you suggest by extending it to cover entitlement changes, as Senator Frist proposed a few years ago, do you think it is still worth trying?

Ms. FRASER. I absolutely do. I think that, you know, we should have all constitutional framework adherent proposals, you know, at both the Congress' and the President's disposal. And I think that even though, you know, the bigger problem that we face is not discretionary spending and is not earmarks, these are very, very important things to do in the public eye, to show them that strong steps are being taken, you know, on sort of parallel tracks.

Chairman FEINGOLD. Thank you.

Mr. Cooper, as you note in your testimony, the current proposal allows the President to temporarily defer or suspend implementation of a spending provision in order to give Congress time to consider a rescissions package, and I agree with you that such a deferral period does not violate the law or the Constitution. Can you just walk through a little bit what the constitutional limits of that temporary deferral authority might be?

Mr. COOPER. Senator Feingold, it has been the practice of this body to delegate to the President the power to defer spending or even to decline to spend in so-called lump-sum appropriations really since the time of President Washington. And the lapsing of that appropriation authority has never been viewed as being in any way a constitutional problem. In fact, I think the *Clinton* case acknowledges that history and the constitutionality of that longstanding practice.

For that reason, I do not believe that there would be a constitutional difficulty even if, for example, during the deferral period that the measures are before you would provide to the President extended beyond the appropriation authorization in the bill that the President was studying for purposes of exercising his power to recommend rescissions.

So I do not see a constitutional difficulty. I think the issues there are more for this body in terms of the kinds of policy issues that it thinks are important in this area.

Chairman FEINGOLD. Thank you, sir.

Ms. Alexander, finally, what do you think of Ms. Fraser's argument that a line-item veto will not solve all of our massive fiscal problems? Should we, nonetheless, support a proposal like this?

Ms. ALEXANDER. Certainly there is no silver bullet. I think that is a true statement. I think in the context of these proposals and focusing on earmarks, limited tax benefits, and tariffs, the bigger issue there that makes this very important, I think, is that there are special opportunities for corruption, and the public understands that those narrowly targeted benefits are what they do not like about how Congress spends money. And so focusing on things that have really undermined confidence in Congress and that while not every earmark is corrupt, not every special tax benefit is corrupt, they do present special opportunities for corruption, and we have seen that in the past. So I think addressing them is an important first step, although it certainly will not address the deficit on its own.

Chairman FEINGOLD. Thank you all for answering my questions.

We are pleased to be joined by our colleague Senator Whitehouse. You may take a round of questions.

Senator WHITEHOUSE. Thank you, Chairman Feingold, and thank you for your work on this issue. I think it is a promising area and one certainly that merits our inquiry and exploration.

Obviously, a proposition like this, if enacted, will create political effects in addition to economic effects, and I noted with considerable interest Senator Conrad's concern expressed in the newspaper, I think yesterday. He is a gentleman who has been around here a very long time who has an exemplary reputation, who is our Chairman on the Budget Committee, and he expressed the concern that this might lend itself to selective and abusive application by the executive branch, not with the intention to reduce spending and control waste, but to punish and reward legislators for their support of or opposition to various things. And I think it is a legitimate concern as to whether unintended consequences of the balance of power between executive and legislative could emerge from this.

So I am particularly interested in probably the most boring section of all, which is Section 4, which, as I read it, sunsets this provision at the end of 2014. Do you all see it as a complete sunset at the end of 2014?

Mr. COOPER. I am not sure I understand, Senator Whitehouse, what you mean by "complete," but the provisions that I have read do seem to suggest that the Act itself will go away completely.

Senator WHITEHOUSE. It will go out of business in 2014.

Mr. COOPER. Yes, sir.

Senator WHITEHOUSE. And would need to be readopted if we were going to continue it beyond then.

Mr. COOPER. Exactly. The power that the President is authorized to exercise in connection with these bills would expire, and if he is ever to exercise it again, it will have to be on the say-so of this body in another bill of that kind.

Senator WHITEHOUSE. It strikes me that the sunset provision accomplishes two things: one, it enables us to have a trial period during which we cannot only evaluate the economic and waste-cutting effects of this provision, but also evaluate the extent to which it affects the balance of power between executive and legislative and does so in a helpful or unhelpful way; and the second is that because the executive branch could see the 2014 sunset and the need to renew it basically ab initio ahead of itself, I would think it would restrain the worst behavior that the bill might otherwise permit for fear that if you blow it now, you blow it forever, because if you abuse this, Congress will never give you back this authority again.

And it strikes me that both as a trial period and as a potential deterrent against the worst political abuses of this provision, Section 4 is a pretty important piece of this legislation and a good element when we are stepping out into something new like this. And I would like to hear your reactions to those two thoughts about Section 4. Ms. Alexander.

Ms. ALEXANDER. We do not object to the sunset. I think there is some merit to the argument that there is a trial period, and this is a rearrangement of the dance between any administration and Congress, particularly on spending. We think there is room for that relationship to change because it is not working to the best interests of the taxpayers right now.

I think, you know, unintended consequences are notoriously hard to predict, whether or not——

Senator WHITEHOUSE. By definition.

Ms. ALEXANDER. Right. The political consequences of a President abusing this authority. Part of the strength of these proposals is that they shed light on specific provisions, and if by highlighting those specific provisions it is easy for a Member of Congress or any special interest to say they have been singled out, I am quite confident that people would do that. You know, sunlight goes both ways, so whoever feels like they might be the victim of being singled out would have a platform and have their interest highlighted. I think, you know, nobody runs for office without knowing what business they are getting into. And might these be political? Yes. Is that necessarily going to be popular with the public? Maybe not. And that may be the reason not to do it for the President and the reason for Congress to be deterred from including particularly egregious spending items.

Senator WHITEHOUSE. Ms. Fraser, what do you think about——

Ms. FRASER. Yes, I think you raise an excellent point, and there is certainly a lot of unintended consequences to be concerned about. One of the things that could happen is, in fact, this tool for the President could actually see spending go up. And I think that is something that none of us on this panel would like to see. So it could be that the sunset provision could be an important sort of check and balance in this new authority itself. And as I spoke about earlier, I do think that that is one of the reasons that you need to combine, you know, a tool like this with other strong spending limitation kinds of tools.

Senator WHITEHOUSE. Mr. Cooper, final thoughts? I did not hear from you on this, and we have about 48 seconds.

Mr. COOPER. Well, Senator Whitehouse, I do not have any thoughts with respect to the constitutional dimension of your question because I just do not think there is a constitutional issue raised by this——

Senator WHITEHOUSE. My question did not have a constitutional dimension. It just had a practical political dimension that——

Mr. COOPER. Yes. Well, the only thing I think I would add—and I think your points are well taken. Certainly the concerns you voiced and that other Senators have, even Senator Byrd back during the days when I represented him in connection with the challenge to the earlier Line Item Veto Act, this was one of his major concerns. But there are other potential unintended consequences of the sunset, and that is that, to whatever extent the President aggressively uses in the way that this body and its intendment would expect, that too could lead to Members of the Senate or Members of the House not being particularly fond of the idea of reenacting it, because, let us face it, the practice of earmarks is one that is a very difficult one to eliminate or to control. And to the extent this measure becomes effective in that, it may create the unintended consequence of something that produced the very good that this seeks to produce would provide the impulse to let it sunset.

So I guess there is another side to that coin——

Senator WHITEHOUSE. It might deter the deterrence.

Mr. COOPER. There may be another side of that coin, but I do think the points that you have made are very well taken.

Senator WHITEHOUSE. Thank you.

Thank you for the time, Chairman Feingold, and thank you for drawing attention to this.

Chairman FEINGOLD. Senator Whitehouse, thank you for your thoughtful involvement in this. I look forward to working with you on this issue.

I want to thank all of our witnesses today. I again want to thank the Ranking Member, Senator Coburn. Even though his schedule did not permit him to take part in the hearing, he and his staff extended every courtesy to us in putting this hearing together, and we thank them for that.

Given the budget challenges facing our country, the line-item veto could not be a more timely issue, and the President's line-item veto proposal is a welcome addition to the measure several of us have already proposed.

President Obama inherited the worst economic mess ever left a new President in our Nation's history, and the crushing recession, which he also inherited, has made it only worse. So we have to get our fiscal house in order. I do not think there is anyone here who would disagree with that.

I realize that an expedited rescissions or line-item veto bill will not solve all of our budget problems. But if it is structured properly, a line-item veto measure can help us reduce wasteful spending and shine a light on unnecessary projects that benefit a few groups at great cost to the rest of the nation. We need to take a step toward addressing our serious fiscal challenges, and I think the administration's proposal will set us on the right track to reducing spending and improving government accountability.

I will be introducing the President's proposal in legislative form shortly with Senator Carper, and I will be pushing to have the Senate pass it this year.

Thanks for all your time, and the hearing is adjourned.

[Whereupon, at 11:14 a.m., the Subcommittee was adjourned.]

[Submissions for the record follow.]

SUBMISSIONS FOR THE RECORD



**Testimony of Ryan Alexander
President, Taxpayers for Common Sense
Senate Judiciary Committee
Subcommittee on the Constitution
hearing on
“The Legality and Efficacy of Line-Item Veto Proposals”**

May 26, 2010

Chairman Feingold, Ranking Member Coburn and Members of the Committee:

Thank you for your invitation to testify today regarding enhanced rescissions authority as set forth in the proposed Reduce Unnecessary Spending Act of 2010. My name is Ryan Alexander, and I am President of Taxpayers for Common Sense (TCS).

TCS is an independent and non-partisan voice for taxpayers working to increase transparency and expose and eliminate wasteful and corrupt subsidies, earmarks, and corporate welfare. Our mission is to achieve a government that spends taxpayer dollars responsibly and operates within its means. All of our work stems from our belief that no one – no matter where on the map or the political spectrum they find themselves – wants to see their money wasted. TCS believes that the federal budget is about more than just dollars and we seek to improve government spending decisions to better mirror the

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nation's priorities. We believe that as taxpayers we have a right and a duty to demand excellence from our government.

TCS supports the Reduce Unnecessary Spending Act of 2010 (RUSA). RUSA would establish a useful tool to cut wasteful government spending without unconstitutionally impinging on Congress' power of the purse. The current appropriations process makes it difficult to cut unnecessary spending, as few members of Congress will vote against entire appropriations bills because of wasteful earmarks or a handful of duplicative programs. RUSA would increase the transparency and accountability of the budgeting process by giving the public more information about where their elected representatives' stand on specific requests that are often buried in omnibus spending or authorization bills. Enactment of RUSA would also provide an opportunity for the Administration and Congress to identify and cut duplicative or obsolete government spending.

In 2006, TCS supported the Line Item Veto Act proposed by the Bush Administration, in part because we found that the number of earmarks in appropriations bills had increased six-fold from 1998 to 2006. At the time, we argued that it would enable the President to shine a spotlight on specific spending and tax provisions and, in essence, ask Congress if they really want to fund them. In FY2010, by comparison, appropriations bills contained some 9,499 congressional earmarks worth \$15.9 billion. The same logic applies now: it is difficult to believe that majorities in both houses of Congress would publicly support many of the current earmark requests, especially during a time when the federal deficit is such a challenge.

Congress has also become increasingly reliant over time on omnibus spending packages that wrap several appropriations bills together in order to complete the budget before the beginning of a new fiscal year. These bills, which can be thousands of pages long, often hide the various earmarks members may have inserted for pet projects back in their district. Even under the improved disclosure rules, there is still no centralized site—physical or on the internet—run by the government where the public can see all of the individual projects members have inserted into massive spending bills through the use of earmarks.ⁱ

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At the same time, the general recognition that federal spending continues to grow at an unsustainable rate relative to revenue has led to a series of insufficient attempts to rein it in. So-called PAYGO rules, which require any new funding be paid for without additional borrowing, include an exemption for emergency spending bills, which can often amount to tens or hundreds of billions in additional spending. Moreover, emergency spending bills routinely contain spending that fails to meet Congress' own definition of "emergency" and are therefore often as likely as any spending bill to contain politically-driven plus-ups, earmarks, or other spending. If Congress is indeed serious about the budget deficit, it should embrace all opportunities, including this legislation, to identify and cut any unneeded spending.

Under the expedited process in RUSA, the President has 45 days after enactment of a funding bill to request that Congress approve a package of specific rescissions to funding programs in the legislation. Congress then must have an up-or-down vote on the entire package without amendment within 25 days.¹¹ The Administration's proposal sets limits to the rescissions the President can offer that are eligible for the fast-track, no amendment protection in Congress. For example, the President is limited to a single package of rescissions per bill, applicable only to provisions in that bill, and they cannot rescind funding for an entitlement program. Any individual rescission that does not meet the requirements can be removed from the package by Congress.

The House would consider any rescission package first; the Senate acts on the package only if the House passes it and is not required to vote on a package the House has already defeated. A House member may raise a point of order against any cut in the package on the grounds that it violates one of the rules for expedited consideration, and if the point of order is sustained, the item is removed from the package. A Senator may also raise a point of order against any proposed cut in the House-passed package. If sustained, the package loses its fast-track, no-amendment designation and is then debated under standard Senate rules.

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One of the usual criticisms of expedited rescission authority is that it will be wielded in a partisan manner by the President. In reality, public scrutiny and oversight renders this unlikely. RUSA requires all the information on the proposed rescission to be made public. If the President is using this budgetary tool to simply score political points, Congress and the public would be quick to notice.

Congress will be well served by expedited rescission authority. Many times, lawmakers are asked to accept smaller spending proposals contained within broader legislation they support. Though relatively small in the context of a massive spending bill, these projects may become examples of government waste that damages Congress' credibility with the public. In some cases lawmakers are able to get it right: stripping funding for the "Bridge to Nowhere" in subsequent legislation, or using reconciliation to remove the so-called "Cornhusker Kickback" from the health care legislation. Expedited rescission authority will potentially enable Congress to eliminate fiscal stains on the record quickly and decisively.

While not all earmarks are by definition wasteful, there are many "Bridges to Nowhere" that pass through the appropriations process with little or no public attention. We believe the increased transparency and accountability this new process can provide to the sometimes obscure appropriations process could lead to a virtuous cycle where the threat of public rescission could reduce the overall number of budgetary earmark requests. Our hope is that this new process will help bring to light, and reduce, some of the more unnecessary spending proposals approved by Congress.

The principle that our tax dollars are too precious to be wasted is true even in times of surpluses and robust, sustained economic growth. But the need to rein in wasteful spending takes on increased urgency in the face of the challenges we face today: from the costs of wars in two theaters, growing costs of addressing domestic needs, and the threat of historically high deficit and debt levels on the horizon. And while economists and politicians may disagree about the importance of reducing the deficit and the debt in times of high unemployment, no one advocates the growth of deficit spending and increased borrowing for wasteful spending. Congress and the Administration both need to take a

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hard look at the practices and options available to increase discipline in the spending arena. The Reduce Unnecessary Spending Act of 2010 would provide a tool for eliminating and curbing wasteful spending, and we hope to see it enacted.

ⁱ Sens. Coburn (R-OK), Gillibrand (D-NY), McCain (R-AZ), and Feingold (D-WI) introduced legislation, S.3335, on May 11 that would direct the Secretary of the Senate and the Clerk of the House to create a timely, searchable, downloadable database of all earmark requests and awards in spending, authorization and tax bills.

ⁱⁱ Assuming rescission requests are eligible under fast-track rules set forth in proposed Reduce Unnecessary Spending Act of 2010

Statement of U.S. Senator Robert C. Byrd

Submitted to the

Senate Judiciary Subcommittee on the Constitution

"The Legality and Efficacy of Line-Item Veto Proposals"

May 26, 2010

Mr. Chairman,

I am not a member of the Senate Judiciary Committee, and so I thank you for the courtesy of allowing me to submit a statement for the record.

On Monday of this week, the President submitted legislation entitled the Reduce Unnecessary Spending Act, which would provide the President with an enhanced or expedited rescission authority.

The bill would establish expedited procedures for the Congress to consider the President's rescission proposals for discretionary and mandatory spending items, while making clear that no rescission proposals, other than the President's, would benefit from these expedited procedures.

On the surface, it is an arrogant proposal. The President is asking the Congress, in advance of the President making any rescission proposal, to forgo amendments, and to forgo extended debate on his requests.

The underlying assertion is that if the President does not request funding for an item, it is potentially wasteful spending. Having requested funding for mine safety in the supplemental appropriations bill now before the Senate – funding not requested by the

President, but still desperately needed and supported by his Administration – I hope Senators will recognize the absolute absurdity of this argument.

Such a procedure would allow the President, without a coequal voice from the Congress, to establish the legislative agenda, and in so doing, use this authority for political purposes potentially unrelated to fiscal discipline. Congress should never hand such power to any President.

The Congress can balance the budget, as it has done in the past, without altering the Constitution or disrupting the balance of powers between the Legislative and Executive branches, which the enhanced rescission authority would certainly do.

In 1993, I delivered 14 speeches, later published as The Senate of the Roman Republic, Addresses on the History of Roman Constitutionalism, on the line-item veto.

After President Clinton signed the Line-Item Veto Act of 1996, I joined with U.S. Senators Carl Levin and Daniel Patrick Moynihan in bringing suit in Federal court against the Director of the Office of Management and Budget (OMB), then Franklin Raines, arguing that the Act authorized the President to cancel spending and revenue measures without observing the procedures outlined in the Presentment Clause of Article

I, Section 7. That suit, *Raines v. Byrd*, was dismissed by the U.S. Supreme Court for lack of standing, but the arguments were later validated in 1998 when the Court nullified the Line-Item Veto Act in *Clinton v. City of New York*.

I have served with twelve Democratic and Republican Presidents who have asked for line-item veto authority, and cheered as the Senate said no to all but one. And when the U.S. Senate erred in yielding to a President's request for such power, I was there when the U.S. Supreme Court nullified the Senate's actions.

The U.S. Constitution is explicit and precise about the role of the President in the legislative process. Article I, Section 7 reads: "Every Bill...shall, before it becomes a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it...."

Enhanced or expedited rescission authority creates a third option for the President. He can sign a spending bill into law, and then strip the provisions he does not like. The President alone would have that authority. He alone would dictate the rescission packages the Congress must consider under expedited procedures, and the Congress would have to lamely submit – voting to accept or reject the President's proposals, without amendment.

Enhanced rescissions would subject every Member -- and the interests of their constituents and states -- to the political, capricious, and unchecked whims of the White House. The President would be empowered to unravel delicately crafted legislative compromises. He could target spending items for certain lawmakers, or make promises not to target them, using his authority to intimidate and reward Members of Congress. Every debate between the Congress and the White House could be swayed by this new power of the President to influence Senators -- to say nothing about how this power could be abused in the days and weeks before an election.

Budget process reform legislation is not a substitute for real deficit reduction. In the eight years that President Bush was in office, he did not submit a single rescission proposal to the Congress. In the sixteen months that President Obama has been in office, he has not submitted a single rescission proposal to the Congress. During that nine-year period, Congress enacted rescissions totaling more than \$90 billion. It is the Congress that has proven that it can use the existing rescission authority to enact significant savings. The Congress should not fall prey to the false promise of a budget process reform that would shift the balance of power toward the President, when President Obama and his predecessor failed to use existing authority.

The U.S. Senate has a responsibility to strengthen and protect the Constitutional system of checks and balances. It falls to the Senate, before the courts, to determine if legislation impermissibly disrupts the balance of power between the Executive and Legislative branches. We should not rely on the courts alone to determine whether a suspect bill passes Constitutional muster.

In my addresses on the history of Roman Constitutionalism, I argued that “Gaius Julius Caesar did not seize power in Rome. The Roman Senate thrust power on Caesar deliberately with forethought, with surrender, with intent to escape from responsibility.” Our founding fathers placed the power of the purse and the power to write legislation in the Congress, in order to provide a check on the centralized power of the executive. By handing our Constitutional responsibilities to the President, and asking that he do our work for us, we surrender the people’s control of the purse strings, and, with it, our most significant check on the Executive.

Let us work together to find a better way to balance the budget and control waste. Let us do so without eroding the people’s most potent check on their Government.

FOR IMMEDIATE RELEASE

**TOM CARPER**

UNITED STATES SENATOR • DELAWARE



FOR RELEASE: May 26, 2010

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SUBCOMMITTEE ON THE CONSTITUTION

COMMITTEE ON THE JUDICIARY

HEARING: "The Legality and Efficacy of Line-Item Veto Proposals"

A copy of Senator Thomas R. Carper's testimony as prepared for delivery:

Chairman Feingold, thank you for allowing me to testify at your hearing today.

Your testimony at my hearing last December on the same issue was quite insightful, and I value your commitment to eliminating wasteful spending.

As we all know, the size of our federal deficit this year continues to be a big problem. Moreover, our future projected deficits are equally concerning because they can add to our national debt and undermine our nation's fiscal stability.

One tool that I believe we could adopt right now that would reduce some of the wasteful spending that contributes to our deficits is an enhanced rescission authority.

Currently, when Congress sends a spending bill to the President, he or she can sign it and then propose that Congress take up specific cuts to the bill just signed into law.

As you know, the problem is that Congress is under no obligation to consider these rescissions. When Congress receives them, they are essentially dead on arrival.

Congress tried to fix this in 1996 by passing the Line Item Veto Act, but that ended quickly with the Supreme Court affirming that the bill was unconstitutional.

I agreed with that decision. The legislation extended extraordinary power to presidents that undermined the checks and balances that the Constitution provides for our executive and legislative branches. Most concerning was that this power was permanent.

That is why last year 21 of our colleagues – Democrats and Republicans – joined me in cosponsoring my rescissions bill S.907, the Budget Enforcement and Legislative Tools Act, which I believe is a much more tempered approach to fixing this problem.

Similar to an earlier proposal of mine that passed the U.S. House of Representatives in 1992 by a 3-1 margin, this new proposal modified the President's current rescission authority so that Congress can no longer ignore rescission proposals. We would have to actually vote on

them. And, our bill did not make that shift of authority permanent. Rather, it provided for what I call a four-year test drive, after which the Congress and the President may elect to extend that authority, amend it or allow it to end.

Under our proposal, a president's rescissions must be largely directed at discretionary spending. Entitlement spending and revenue changes could not be considered.

In order for the cuts proposed by a president to become law, they must pass both the House and Senate by a simple majority vote. If the vote fails in one chamber, the proposed rescissions are dead.

On Monday, the White House sent Congress a message that the President would like to see an expedited rescission bill passed into law. The President's suggested proposal is remarkably similar to our proposal.

One of the few differences is that our bill limited the amount the President could rescind if the spending item was authorized. If the President proposed a rescission of more than 25 percent of an authorized item, then this request would not get a vote.

The President's proposal does not distinguish between authorized items and unauthorized items, and allows for up to 100 percent of an authorized item to be rescinded.

Another more substantive difference is that the President's proposal allows for any member of the Senate to challenge a proposed cut IF the President attempts to abuse the authority by using it as a vehicle to make a significant policy change.

So, if the President's proposed rescission is actually a masked attempt to alter existing policy, then a Senator can raise of point of order against the bill. If the challenge is sustained, then the package loses its fast-track privilege.

When combined with the four-year sunset, this provision gives us one more way to ensure that a President is unlikely to abuse this new authority.

I will be reaching out to our 21 cosponsors to explore with them their interest in supporting a rescission proposal with all of the President's suggested modifications this week.

While expedited rescission authority is not a silver bullet for eliminating the deficit, it can serve as a helpful addition to our toolbox to eliminate wasteful spending.

I look forward to working with you, Senator Feingold, and our colleagues to pass the President's expedited rescission proposal -- or something similar to it -- and to begin to restore a measure of fiscal sanity in the government of our nation.

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Senator Tom Coburn
Opening Statement for the Hearing
“The Legality and Efficacy of Line-Item Veto Proposals”

I would like to thank Senator Feingold for calling this hearing and the witnesses for being here today. We appreciate hearing your testimony on this issue.

By the end of this week, our national debt will climb above the thirteen-trillion dollar threshold. In view of this rising debt, Congress has the responsibility to consider all measures which will contribute to the fiscal discipline that is currently lacking in our federal government. Among these measures is the line-item veto, which we are here to discuss today. I believe a line-item veto is one of the many tools Congress needs to utilize in our efforts to control the rising debt, and as such I am a co-sponsor of S.524, the “Congressional Accountability and Line-Item Veto Act of 2009,” which Chairman Feingold has introduced.

The line-item veto will allow the President to single out wasteful spending in legislation and will give Congress the opportunity to reconsider its spending priorities in view of our rising debt. I am hopeful this veto power will expose our appropriations process to the oversight and critical evaluation it needs, but believe this reform must only be viewed as one of the first steps towards fiscal responsibility, rather than one of the last.

Both Congress and the President already have all the necessary tools to rein in runaway spending, but neither branch has shown the political will to do so. The line-item veto would add one more tool to this arsenal, but it will still require the President and Congress to have the courage of their convictions when it comes to spending. All too often, Washington politicians enact process reforms to great fanfare, only to cast these reforms aside as they find it politically expedient.

If the President utilizes a new line-item veto power aggressively and Congress supports this effort by approving rescission requests, the federal government might, finally, begin to follow the path to fiscal responsibility. If Congress continues to spend irresponsibly, however, the line-item veto could simply become another process reform that is cast aside whenever Congress views it as an obstacle to what they desire.

I sincerely hope the line-item veto can become an effective tool to rein in federal spending and begin our government along the path to fiscal responsibility. I believe the proposals before us today are an appropriate first step along that path, and I am thankful this hearing provides the opportunity to evaluate the legality and efficacy of these proposals. I thank the Chairman for calling it.

STATEMENT OF CHARLES J. COOPER

Before the
Senate Committee on the Judiciary
Subcommittee on the Constitution

Concerning

“The Legality and Efficacy of Line-Item Veto Proposals”

May 26, 2010

STATEMENT OF CHARLES J. COOPER

Before the
Senate Committee on the Judiciary
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Concerning

“The Legality and Efficacy of Line-Item Veto Proposals”

May 26, 2010

Good morning Mr. Chairman and Members of the Committee. My name is Charles J. Cooper, and I am a partner in the Washington, D.C., law firm of Cooper & Kirk, PLLC. I appreciate the Committee’s invitation to present my views on the constitutionality of recently proposed measures designed to give the President authority akin to a line-item veto. In particular, in connection with this hearing I have reviewed two proposals: the “Congressional Accountability and Line-Item Veto Act of 2010,” which has been introduced in this body as S. 524; and the “Reduce Unnecessary Spending Act of 2010,” which was submitted to Congress by President Obama earlier this week. For reasons that I shall discuss below, I believe that both of these proposals are constitutional. But first I would like to outline my experience in this esoteric area of constitutional law.

I have spent the bulk of my career, both as a government lawyer and in private practice, litigating or otherwise studying a broad range of constitutional issues. On several different occasions, strangely enough, I have been involved in matters relating to the constitutionality of measures designed to vest the President with authority to exercise a line item veto or its functional equivalent. In early 1988, while I was serving as the Assistant Attorney General of the Office of Legal Counsel of the Department of Justice, President Reagan asked the Justice Department for its opinion on the question whether the Constitution vests the President with an *inherent* power to exercise an item veto. Certain commentators at that time had advanced the proposition that the President did indeed have such inherent constitutional power. *See* Steven Glazier, *Reagan Already Has Line-Item Veto*, WALL ST. J., Dec. 4, 1987, at 14, col. 4. After exhaustive study, the Justice Department reluctantly concluded that the proposition was not well-

founded and that the President could not conscientiously attempt to exercise such a power. The opinion of the Office of Legal Counsel is publicly available at 12 Op. Off. Legal Counsel 128 (1988).

In April of 1996, Congress enacted the Line Item Veto Act of 1996, which authorized the President to “cancel” certain spending and tax benefit measures after he had signed into law the bill in which they were contained. Shortly thereafter, Senators Byrd, Moynihan, Levin, and Hatfield, as well as several members of the House of Representatives, challenged the constitutionality of the Line Item Veto Act, and I was among a group of lawyers representing them. Although the district court invalidated the Act, the Supreme Court held that the Members of Congress lacked standing to litigate their constitutional claims. Adjudication of the Act’s constitutionality would therefore have to await the suit of someone who had suffered judicially cognizable injury resulting from an actual exercise of the President’s statutory cancellation power. *See Raines v. Byrd*, 521 U.S. 811 (1997). That did not take long.

Less than two months after the Supreme Court’s decision in *Raines*, President Clinton exercised his authority under the Line Item Veto Act to cancel “one item of new direct spending” in the Balanced Budget Act of 1997, which had the effect of reducing the State of New York’s federal Medicaid subsidies by almost \$1 billion. The City of New York and certain healthcare associations and providers, which had lost many millions of dollars in federal matching funds as a direct result of the President’s cancellation, brought a suit challenging the constitutionality of the Line Item Veto Act. The Supreme Court struck down the Line Item Veto Act, concluding that “the Act’s cancellation provisions violate Article I, § 7, of the Constitution.” *Clinton v. City of New York*, 524 U.S. 417, 448 (1998). The *Clinton* case controls the analysis of the constitutionality of the line item veto measures that have been proposed, and so an extended discussion of the case is warranted.

The Line Item Veto Act of 1996 provided that the President may “cancel in whole” any (1) “dollar amount of discretionary budget authority,” (2) “item of new direct spending,” or (3) “limited tax benefit” by sending Congress a “special message” within five days after signing a bill containing the item. 2 U.S.C. § 691(a). Cancellation took effect when Congress received the special message. 2 U.S.C. § 691b(a).

The Act defined “cancel” as “to rescind” (with respect to any dollar amount of discretionary budget authority) and to “prevent . . . from having legal force or effect” (with respect to items of new direct spending or limited tax benefits). *Id.* § 691e(4). The purpose of the term and its definition was to make it clear that the President’s action would be permanent and irreversible: “The term ‘cancel’ was specifically chosen, and is carefully defined. . . . The conferees intend that the President may use the cancellation authority to surgically *terminate* federal budget obligations.” H.R. REP. NO. 104-491, at 20 (1996) (Conf. Rep.) (emphasis added). For taxes, cancellation mandated “collect[ion of] tax that would otherwise not be collected or . . . den[ial of] the credit that would otherwise be provided.” *Id.* at 29.

Thus, a presidential cancellation under the 1996 Act *extinguished* the cancelled provision, as though it had been formally repealed by an act of Congress. A presidential cancellation operated on the provision of the law itself, permanently removing it from the body of operative federal statutes, and neither the President who cancelled the provision nor any successor President could exercise the authority that the provision, before its cancellation, had granted. It could be restored to the status of law only if a “disapproval bill,” 2 U.S.C. §§ 691d, 691e(6), was enacted according to the procedure prescribed by Article I, Section 7.

In striking down the Line Item Veto Act of 1996, the Supreme Court in *Clinton* concluded that vesting the President with unilateral power to “cancel” a provision of duly enacted law could not be reconciled with the “‘single, finely wrought and exhaustively considered, procedure’ ” established under Article I, Section 7 for enacting, or repealing, a law -- bicameral passage and presentment to the President. 524 U.S. at 439-40, quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983). As the Court explained, Article I, Section 7 “explicitly requires that each of . . . three steps be taken before a bill may ‘become a law.’ ”: “(1) a bill . . . [is] approved by a majority of the Members of the House of Representatives; (2) the Senate approve[s] precisely the same text; and (3) that text [is] signed into law by the President.” 524 U.S. 448. And if the President disapproves of the Bill, he must “reject it in toto.” *Id.* at 440, quoting 33 WRITINGS OF GEORGE WASHINGTON 96 (J. Fitzpatrick ed., 1940). The *in toto* requirement ensures that the President, like the House and Senate, lacks power to unilaterally revise the text of the measure approved by the other participants in the lawmaking process.

President Clinton's cancellation, however, did unilaterally revise the law by "prevent[ing] one section of the Balanced Budget Act of 1997 . . . 'from having legal force or effect,' " while permitting the remaining provisions of the Act "to have the same force and effect as they had when signed into law." 524 U.S. at 438. Accordingly, the Court concluded that "cancellations pursuant to the Line Item Veto Act are the functional equivalent of partial repeals of Acts of Congress that fail to satisfy Article I, § 7." *Id.* at 444.

The Reduce Unnecessary Spending Act and S.524 in contrast, are framed in careful obedience to Article I, Section 7 and to the Supreme Court's teaching in *Clinton*. The President is not authorized by the bill to "cancel" any spending or tax provision, or otherwise to prevent such a provision "from having legal force or effect." To the contrary, the purpose of the proposed measures is simply to provide a fast-track procedure to require the Congress to vote up-or-down on rescissions proposed by the President. Thus, any spending or tax provision duly enacted into law remains in full force and effect under the bill unless and until it is repealed in accordance with the Article I, Section 7 process -- a bicameral passage and presentment to the President.

To be sure, the line item veto proposals would authorize the President to temporarily "defer" or "suspend" (hereinafter "defer") execution of the spending or tax provision at issue. S.524 would authorize deferral for a single period of up to 45 calendar days of continuous session of Congress from the date that the President transmits his rescission proposal to Congress. The Reduce Unnecessary Spending Act, likewise, would authorize such a deferral (1) for a single period of up to 25 days of session by either the House or the Senate, whichever is later, but (2) in no event could the deferral extend beyond "the last day after which obligation of the funding in question can no longer be fully accomplished in a prudent manner before its expiration." The purpose of this deferral authority, obviously, is simply to allow the Congress adequate time to consider the President's rescission proposals and to vote them up-or-down. The President would be authorized to terminate the deferral, however, at any time that he determined that continuation of the deferral would not further the purposes of this Act.¹

¹ Continuing to defer execution of a spending or tax provision after a rescission proposal is voted down by one or both Houses of Congress would presumably not further, except in the most unusual of circumstances, the

Accordingly, if at any time during the pendency of the deferral period, the President changes his mind about the deferred spending or tax provision, or if a successor President disagrees with his predecessor's deferral decision, the President would be free to terminate the deferral and execute the provision. Likewise, if Congress does not approve the President's rescission proposal, the President would be required to make the funds or tax benefits available no later than the end of the deferral period -- which, again, cannot exceed a single specified period of time. Thus, deferral of a spending or tax provision under the bill does not rescind or otherwise prevent the provision from having legal force or effect. To the contrary, the provision remains "law" during the deferral period, and it must be executed at the moment the deferral period ends, unless Congress itself has enacted a new law rescinding it.

The congressional practice of vesting discretionary authority in the President to defer, and even to decline, expenditure of federal funds has been commonplace since the beginning of the Republic, and its constitutionality has never seriously been questioned. Indeed, the First Congress enacted at least three general appropriations laws that appropriated "sum[s] not exceeding" specified amounts for the government's operations. *See* Act of Sept. 29, 1789, ch. 23, § 1, 1 Stat. 95; Act of Mar. 26, 1790, ch. 4, § 1, 1 Stat. 104; Act of Feb. 11, 1791, ch. 6, § 1, 1 Stat. 190. *See* Ralph S. Abascal & John R. Kramer, *Presidential Impoundment Part I: Historical Genesis and Constitutional Framework*, 62 GEO. L.J. 1549, 1579 (1974). By appropriating sums "not exceeding" specified amounts, Congress gave the President discretion to spend less than the full amount of the appropriation, absent some other statutory restriction on that discretion. *See, e.g.,* H.R.

purposes of the Act. Statutorily requiring or triggering termination of the deferral, however, on a negative vote on the President's rescission proposal in either House of Congress would raise a serious constitutional issue under *Chadha*, which held that any action by Congress that has "the purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch" is a legislative action that must conform to the bicameralism and presentment requirements of Article I, Section 7, of the Constitution. *INS v. Chadha*, 462 U.S. 919, 952 (1983). As framed in the bill, however, the deferral provisions would not raise this concern under *Chadha* even if the President felt bound in good faith (as he presumably would) to terminate any deferral at the moment that either House voted down his rescission proposal.

Rep. No. 1797, 81st Cong., 2d Sess. 9 (1950) (“Appropriation of a given amount for a particular activity constitutes only a ceiling upon the amount which should be expended for that activity.”)

The First Congress also enacted laws providing for “lump-sum” appropriations – that is, appropriations for the operation of a department that do not specify the particular items for which the funds were to be used. The President was thereby given discretion not only with respect to how much of the appropriated sum to spend, but also with respect to its allocation among authorized uses. *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 322 (1937) (“Appropriation and other acts of Congress are replete with instances of general appropriations of large amounts, to be allotted and expended as directed by designated governmental agencies.”). As the Supreme Court has noted, “a fundamental principle of appropriations law is that where Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions.” *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) (internal quotation marks omitted). And the constitutionality of such lump-sum appropriations “has never been seriously questioned.” *Cincinnati Soap Co.*, 301 U.S. at 322.

Congress has typically enacted lump-sum appropriations when Executive Branch discretion and flexibility were viewed as desirable, particularly during periods of economic or military crisis. See Louis Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 LAW & CONTEMP. PROBS. 135, 136 (1972). During the Great Depression, for example, Congress granted the President broad discretion to “reduce . . . governmental expenditures” by abolishing, consolidating, or transferring Executive Branch agencies and functions. Act of Mar. 3, 1933, ch. 212, § 16, 47 Stat. 1517-1519 (amending Act of June 30, 1932, ch. 314, §§ 401-408, 47 Stat. 413-415)). All appropriations “unexpended by reason of” the President’s exercise of his reorganization authority were to be “impounded and returned to the Treasury.” 47 Stat. 1519.

In 1950, Congress vested the President with general authority to establish “reserves” – that is, to withhold the expenditure of appropriated funds – in order “to provide for contingencies, or to effect savings whenever savings are made possible by or through changes in requirements, greater efficiency of operations, or other [post-appropriation] developments.” General Appropriation Act, 1951, ch. 896, § 1211, 64 Stat. 765-766. Similarly, the Revenue and Expenditure Control Act of 1968, Pub. L. No.

90-364, §§ 202(a), 203(a), 82 Stat. 271-72, authorized the President to reserve as much as \$6 billion in outlays and \$10 billion in new obligation authority, with no restrictions on the President's discretion regarding what spending to reduce. §§ 202(b), 203(b), 82 Stat. 272. *See also* Second Supplemental Appropriations Act, 1969, Pub. L. No. 91-47, § 401, 83 Stat. 82; Second Supplemental Appropriations Act, 1970, Pub. L. No. 91-305, §§ 401, 501, 84 Stat. 405-407.

And in the Impoundment Control Act of 1974 (ICA), 2 U.S.C. 681 *et seq.*, Congress distinguished between two forms of impoundment: deferrals (delays in spending during the course of a fiscal year, or other period of availability) and rescissions (permanent withholdings of spending of appropriated funds). *See* 2 U.S.C. 682(1), 682(3). While generally authorizing the President to carry out deferrals, *see* 2 U.S.C. 684 (1982), the Act prohibited the President from engaging in unilateral rescissions. Instead, it authorized the President to propose rescissions to Congress under a mechanism for expedited legislative consideration. 2 U.S.C. 683 (1982).

In sum, when Congress has passed lump-sum appropriations bills, or when it has given the President general authority to reduce government spending below appropriated levels, Congress has largely freed the President to exercise his own judgment regarding which spending programs to reduce and how much to reduce them. And while the scope of authority vested in the President has varied in response to changing legislative judgments about the need for Executive Branch discretion, the extent of the Executive's spending discretion has always been regarded, both by Congress and by the courts, as a matter for Congress itself to decide through the legislative process.

In the *Clinton* case, the Government's constitutional defense of the 1996 Line Item Veto Act relied heavily on this long interbranch tradition of presidential spending discretion. The Government argued that the President's cancellation power was not a unilateral power of repeal, but rather was simply, "in practical effect, no more and no less than the power to "decline to spend" specified sums of money, or to "decline to implement" specified tax measures." Gov. Br. at 40. The Act merely granted the President general discretionary authority that is materially indistinguishable, the Government argued, from the specific discretionary authority routinely granted to the President in "lump sum" appropriations measures since the days of President Washington.

But the dispositive distinction, as noted previously, between a lump-sum appropriations statute and the Line Item Veto Act of 1996 was that the former grants the President discretion in the *implementation* of the spending measure, while the Line Item Veto Act granted the President discretion to *extinguish* the spending measure. The President may exercise lump-sum spending discretion at any time during the appropriation period, and if the President decides not to spend some or all of the appropriated funds, the authority to spend the funds -- that is, the law itself -- remains in place until it expires in accord with the terms of the statute. The President (or his successor) retains discretion throughout the appropriation period to reverse a prior decision not to spend in light of new information, further experience, or reordered priorities. Not until the appropriation law expires, or is repealed in accord with Article I, is the President's spending discretion extinguished. In short, discretion over spending operates on the funds, not on the law authorizing it. In contrast, the President's cancellation discretion under the 1996 Line Item Veto Act operated directly on the law authorizing the spending, effectively revising its text to strike the spending or tax provision itself, permanently. And if the President (or his successor) subsequently changed his mind about a cancelled item, he was powerless to revive it.

Accordingly, the Supreme Court in *Clinton* concluded that the President's cancellation power under the Line Item Veto Act crossed the constitutional line between traditional discretionary spending authority and lawmaking: "The critical difference between [the Line Item Veto Act] and all of its predecessors . . . is that unlike any of them, this Act gives the President a unilateral power to change the text of duly enacted statutes." 524 U.S. at 446-47.

Nothing in either of the current line item veto proposals, however, even arguably grants the President the unilateral power to change the text of a duly enacted statute. Indeed, the deferral authority that would be vested in the President under the bill is actually *narrower* than the spending discretion that Congress has routinely accorded the President throughout the Nation's history. Again, a deferral under these measures can last no longer than a single specified period of time, and immediately thereafter the President is obliged to execute the spending or tax provision for which he has unsuccessfully sought congressional rescission. The possibility (however remote) that the appropriation statute could expire during the period in which spending has been deferred does not alter this analysis. The

President's discretionary authority to terminate the deferral and to execute the spending provision at issue would remain in full force and effect right up until the moment that the appropriation statute expired under its own terms.

The constitutional validity of the President's deferral authority under these measures can be brought into sharper focus by hypothesizing an appropriations statute in which each individual spending or tax benefit item is accompanied by its own specific proviso authorizing the President to defer its execution for a specified period pending congressional resolution of a presidential rescission proposal. The constitutional authority of Congress to condition the expenditure or obligation of federal funds in this manner is clear. The bill would merely make such presidential deferral authority generally applicable rather than specifically targeted. And it is clear that the President's deferral authority under the proposed line item veto measures would act only as a *default* rule, for nothing in the bill purports to prevent Congress from determining that the President's deferral authority shall not apply to a particular spending or tax benefit measure or any portion thereof in the future. See *Raines*, 521 U.S. at 824 (Congress may "exempt a given appropriations bill (or a given provision in an appropriations bill) from the Act.").

The short of my testimony is this: The Supreme Court's decision in *Clinton* recognizes and enforces the constitutional line established by Article I, Section 7, between the power to exercise discretion in the making, or unmaking, of law and the power to exercise discretion in the execution of law, which in the spending context has historically included the power to defer, or to decline, expenditure of appropriated funds. Congress cannot constitutionally vest the President with the former, but it can the latter, and has done so repeatedly throughout our Nation's history. In my opinion, the powers that would be granted the President under the Congressional Accountability and Line-Item Veto Act of 2010 and the Reduce Unnecessary Spending Act of 2010 fall safely on the constitutional side of that line.

Again, Mr. Chairman, I appreciate this opportunity to share my views with the Committee.

**Senate Judiciary Committee
Subcommittee on the Constitution**

Hearing on “The Legality and Efficacy of Line-Item Veto Proposals”

Statement of Chairman Feingold

May 26, 2010

Good morning and welcome to this hearing of the Constitution Subcommittee. This morning, the subcommittee will review the legality and efficacy of expedited rescission proposals, which are more commonly referred to as line-item veto proposals.

Every year since I was first elected to the U.S. Senate, I’ve held listening sessions in each of Wisconsin’s 72 counties. I’ve held over 1200 of them so far, and have heard from tens of thousands of people all across my home state. And while health care reform has been the top issue discussed at those listening sessions, the need to rein in wasteful spending, and especially wasteful earmark spending, has been raised consistently.

And it’s never been a more urgent issue.

That’s why it was especially encouraging to have the President come forward just two days ago with his own proposal for an expedited rescission, or line-item veto, measure.

When he took office, President Obama was handed perhaps the worst economic and fiscal mess facing any administration since Franklin Roosevelt took office in 1933. The legacy President Obama inherited poses a gigantic challenge.

There is no magic bullet that will solve all our budget problems. Congress has to make some tough decisions, and there will be no avoiding them if we are to get our fiscal house in order. But we can take some steps that will help Congress make the right decisions, and that can sustain the progress we make.

A line-item veto, properly structured and respectful of the constitutionally central role Congress plays, can help us get back on track. And that is what we will explore in today’s hearing.

I have advocated for giving the President expedited rescission, or line-item veto, authority for a long time. Over the past two Congresses, I have been pleased to join with my colleague from Wisconsin, Congressman Paul Ryan, the Ranking Member of the House Budget Committee, in offering a proposal that specifically targets earmark spending. He and I have worked on this issue for several years. While we belong to different political parties, and differ on many issues, we do share at least two things in common—our hometown of Janesville, Wisconsin, and an abiding respect for Wisconsin’s tradition of fiscal responsibility.

Among the many Members who have joined us in that particular effort is the Ranking Member of this Subcommittee, the Senator from Oklahoma, Dr. Tom Coburn. I am delighted to have Senator Coburn as a cosponsor of our bill. There is no more energetic foe of wasteful earmark spending, and I have been pleased to work with him on a number of different efforts to rein in that practice.

There have been a number of line-item veto proposals offered in the past several years. But the measure we proposed is unique in that it specifically targets the very items that every line-item veto proponent cites when promoting a particular measure, namely earmarks.

When President Bush asked for this kind of authority, the examples he gave when citing wasteful spending he wanted to target were congressional earmarks. When members of the House or Senate tout a new line-item veto authority to go after government waste, the examples they give are congressional earmarks. When editorial pages argue for a new line-item veto, they, too, cite congressional earmarks as the reason for granting the President this new authority.

While we have made some progress on earmarks, they continue to be a serious problem. By one estimate, in 2004 alone more than \$50 billion in earmarks were passed. Just last year, the Omnibus Appropriations bill for FY 2009, which passed in March of 2009, contained more than eight thousand earmarks costing \$7 billion. And the Consolidated Appropriations bill for FY 2010, which passed in December, included nearly five thousand earmarks, costing \$3.7 billion.

There is no excuse for a system that allows that kind of wasteful spending year after year, and while I have opposed granting the President line-item veto authority to effectively reshape programs like Medicare and Medicaid, for this specific category, I support giving the President this additional tool.

Under the bill Congressman Ryan and I proposed, wasteful spending would have nowhere to hide. It will be out in the open, so that both Congress and the President have a chance to get rid of wasteful projects before they begin. I invited my colleague from Wisconsin to testify today, but unfortunately, his schedule does not permit him to be with us in person. He will submit written testimony and we will include that in the hearing record.

Of course, there are other expedited rescission or line item veto ideas that have merit as well. The Senator from Delaware, Senator Carper, who will lead off our hearing today, has a proposal, which he may wish to discuss. I've been proud to work with Senator Carper on a number of critical budget issues, including the restoration of the PAYGO budget rule which was so central to our ability to balance the government's books during the 1990s. He has been a true champion of taxpayers, and his work in this area is another example of that leadership.

And then there is the President's expedited rescission, or line-item veto, proposal that Senator Carper and I will be introducing shortly. We are pleased to have Jeffrey Liebman from the Office of Management and Budget with us today to discuss the President's proposal, which is an exciting and important development. The President's approach includes most of what Congressman Ryan and I have targeted, and I believe what Senator Carper targets in his measure as well.

While we seek to find ways to support our goal of cutting wasteful spending, it is essential that any new budget tools we create be constitutional. That is part of the core mission of this Subcommittee, and to help us in this regard, we are privileged to have a distinguished Washington attorney and former Assistant Attorney General for the Office of Legal Counsel under President Reagan, Charles J. Cooper.

Helping us assess the potential value a line-item veto might bring to budget discipline is another of today's witnesses, Ryan Alexander, from Taxpayers for Common Sense, a respected budget watchdog group. Finally, joining Mr. Cooper and Ms. Alexander on the third panel will be Alison Fraser from the Heritage Foundation.

I look forward to an open dialogue on these important questions, and I thank the witnesses for the time they have devoted and the effort they have made to be here with us today.

At this point, I would typically turn it over to Senator Coburn, my Ranking Member, but he is tied up in another important meeting about our debt crisis. I do want to thank Senator Coburn for his cooperation in organizing this hearing, and I look forward to working with him on this issue.



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CONGRESSIONAL TESTIMONY

**Testimony before
Constitution Subcommittee of the Senate
Judiciary Committee
United States Senate**

May 26, 2010

**Alison Acosta Fraser
Director, The Thomas A. Roe Institute for Economic
Policy Studies
The Heritage Foundation**

My name is Alison Fraser. I am the Director of the Thomas A. Roe Institute for Economic Policy Studies at The Heritage Foundation. The views I express in this testimony are my own, and should not be construed as representing any official position of The Heritage Foundation.

S. 524, the Congressional Accountability and Line-Item Veto Act of 2009, would enhance the President's existing toolkit to control federal spending. Presidents have long sought additional authority over spending legislation through powers similar to nearly every governor in the nation. After the Supreme Court struck down the Line Item Veto Act of 1996, several attempts have been made to strengthen the President's existing authority under the Congressional Budget and Impoundment Control Act of 1974. As the nation watches the fiscal contagion which started with Greece's budget crisis spread across Europe, the concerns and attention to unsustainable federal spending on our own shores have taken on crucial new urgency.

Underwhelming Track Record of Rescissions

A president currently has authority to submit a package of spending reductions for Congressional action under the Impoundment Control Act (ICA). Congress, however, is not required under the existing ICA to act on rescission package submissions. Every President since 1974 regularly submitted packages to Congress except George W. Bush. President Reagan submitted the most rescission requests to Congress: 602 requests totaling \$43 trillion. But, Congress accepted only 36 percent of these requests. President George H.W. Bush in his one term in office submitted 169 rescissions of \$13 trillion, of which Congress approved only 20%. Of the \$43 trillion in federal spending since 1990, Presidents have proposed rescinding only \$20 billion, and Congress has approved just \$6 billion – just 0.01 percent of all spending. Only in 1981 and 1982 did total enacted rescissions exceed 1 percent of discretionary spending. Thus, the track record for rescissions is underwhelming¹.

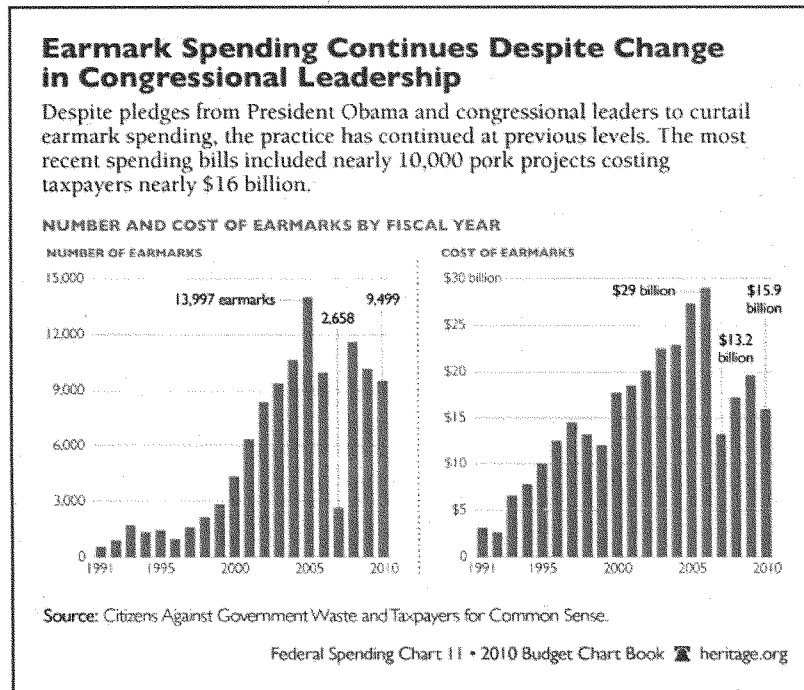
Enhanced Authority

This legislation would enhance existing Presidential ICA authority by two ways: requiring Congress to act via an up or down vote without amendment, and that that vote must occur within certain time parameters. While this is certainly an improvement, it is only a slight one and will not likely have a major impact on the trajectory of federal spending in and of itself. This enhancement only applies to earmarks, limited tariff benefit or targeted tax benefit, making it even less likely to have a material impact on spending given the sheer magnitude – or lack thereof – of these fiscal categories.

For example, there were approximately 9,500 earmarks in FY 2010 appropriations bills totaling nearly \$16 billion. Yet, discretionary spending alone increased by \$117 billion in 2010. So even eliminating all earmarks through enhanced recession would barely dent spending growth. Since many earmarks do not appear in appropriations bills (despite promises and limited reform efforts to the contrary) but conference reports which are not

¹ Susan A. Poling, "Impoundment Control Act: Use and Impact of Rescission Procedures," GAO-10-320T, December 16, 2009

legally binding, it is unclear whether they would qualify for this enhanced rescission. From a purely budgetary standpoint, the impact of the legislation seems minimal. Moreover, the nature of the political process makes it inconceivable that Members of Congress would vote to overturn all their hard fought earmarks even if the President inclined to submit them all in a rescission package. The same holds true for preferential tax treatments and limited tariff benefits which are equally hard fought by armies of lobbyists and special interest groups.



Perceptions and Unintended Consequences

As with any legislation there are the risks of “unintended consequences.” One risk with this Act is that by focusing on tightly targeted criteria Congress could continue to increase discretionary spending beyond earmarks and mandatory spending – which is the lion’s share of the budget. This could lead to the perception that Congress is taking substantive, material steps to control spending, when in fact the opposite could be true. It could also take pressure off of Congress and the President to seriously address our looming fiscal crisis by giving additional credence to the notion that earmarks are the major cause of runaway federal spending and today’s unprecedented deficits. Moreover, budgetary horse-trading could result in a Member’s support for even higher spending on

presidential priorities being garnered in exchange for said Member's favored earmark or tax treatment not appearing in a rescissions package.

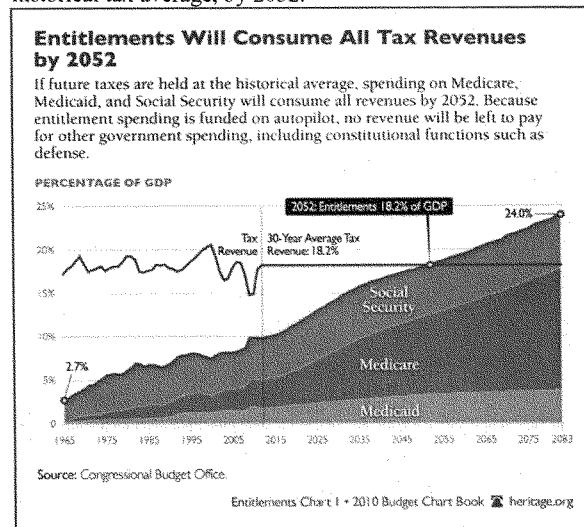
Improvements to Legislation

One way to make this legislation more effective would be to allow more spending to be included in Presidential rescissions. For example, the Legislative Line-Item Veto Act of 2006 by Senator Bill Frist (R-TN) and Representative Paul Ryan (R-WI) would have allowed the President to include entitlement changes and all discretionary appropriations. Discretionary spending has grown 79 percent since 2000 in real terms, so including broader criteria in the legislation could increase the likelihood that material reductions in spending could occur and would take the focus off of earmarks alone as the major driver of our spending problem. Adding entitlement law changes would give even broader authority to address the major spending drivers.

More Needed

As noted, the focus in the Congressional Accountability and Legislative Line Item Veto Act on preferential treatments in earmarks, taxes and tariffs, are not broad enough to materially affect the trajectory of federal spending. Nor is discretionary spending, less than 40 percent of total spending, the root of the problem. The real cause is mandatory spending, which today comprises 56 percent of total spending. In real terms mandatory spending has increased over 200 percent since 1990, driven largely by entitlement spending on Social Security, Medicare and Medicaid.

The growth in health care and demographic changes are set to drive spending on these three programs alone to levels that will eclipse the historical levels of taxation in less than two generations: from 9.8 percent of GDP in 2010 to 18.2 percent of GDP, the 30 year historical tax average, by 2052.



Total spending over that same time frame would increase to 39 percent of GDP, leaving crushing deficits of over 20 percent of GDP, as large as the historical level of spending. Of course this will not happen as the experiences of Greece, Spain, Portugal and other nations are showing. Decisive steps are needed now to ensure that we avoid a crisis or contagion before it reaches our shores. To do that, additional tools and controls are necessary.

Budget Transparency

When Congress establishes its annual budget plans in the budget resolution, it frequently includes a limit on the debt, which today stands at \$14.3 trillion. This often painful vote is not the only mark of the federal government's obligations, since it does not measure the excess costs, or unfunded obligations, of entitlement programs into the future. This is akin to setting a family debt limit by including only the credit card and ignoring the costs of the mortgage. Those costs for Social Security and Medicare are nearly \$46 trillion. Moreover, appropriations are written only for discretionary spending, less than half of total spending.

Mandatory spending on entitlement programs enjoys the distinction of running on what many call "auto-pilot" without annual appropriations or even regular re-authorization. Thus the main drivers of federal spending are allowed to grow outside the limits established in the budget resolution making a somewhat lopsided focus on the smaller part of spending as priorities are considered and tradeoffs made. The focus on the debt limit, whether in the budget resolution or not, as the only measure of debt and sustainable fiscal policy, is incomplete since it does not include long-term exposures. Towards that end, the following changes to the budget process would bring additional spending controls to address the entitlement spending problem:

- Disclose the long-term entitlement obligations in the budget resolution, providing lawmakers and the public a much fuller understanding of the current and future budget outlook
- Require a similar long-term assessment for Medicaid be made by the Centers for Medicaid and Medicare Services, and
- Set a firm limit on these obligations, with a vote required that will increase these costs on future generations.

Long-Term Scoring

All major policy changes should be scored over the long-term, in addition to the traditional five- or 10-year budget window, to indicate what impact they would have on these unfunded obligations. This would prevent gaming the system by, for example, starting new benefits midway through a shorter-term scoring period to make their costs seem artificially low. It would require a discussion of whether new policies are affordable over the long run.

Long-Term Budget for Entitlement Spending

During annual budget debates, Congress does not limit the costs of entitlement programs as noted earlier, instead they discuss a projection of likely costs. As a consequence, entitlement spending consumes a larger and larger share of tax revenues and less room is left for the other priorities that Congress does debate.

This autopilot budget should be changed into a real budget. Retirement programs require a longer time horizon and more planning certainty so beneficiaries will not face abrupt annual changes in their benefits. Entitlement programs should be converted to a long-term budget framework for a constrained entitlement budget that would be periodically re-evaluated to ensure that these programs are sustainable and affordable over the long term.

This could be done by creating a long-term budget window—30 years, for example. All spending would be reviewed regularly every five years, and Congress would be required to take action to keep the programs within this budget framework, with some form of automatic triggers put in place if Congress does not act². Alternatively, a bipartisan commission could recommend measures to Congress for an expedited vote to bring the programs back within the budget framework.

Summary

The Congressional Accountability and Line-Item Veto Act is a potentially useful tool that could be used to reduce the unprecedented and unsustainable growth in federal spending, especially if it is broadened to include more spending categories. Past Presidents have used existing rescission authority effectively and enhancements included in the Act will strengthen it further. However, it will likely not have the material effect needed on spending, and as noted there are downsides that must be considered. Beyond this legislative line-item veto, additional budgetary tools are necessary to address the fiscal crisis we are soon to face unless decisive steps are taken soon.

² Stuart M. Butler, Alison Acosta Fraser and other authors, "Taking Back our Fiscal Future," March 31, 2008, White Paper, at <http://www.heritage.org/Research/Reports/2008/03/Taking-Back-our-Fiscal-Future>

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**EXECUTIVE OFFICE OF THE PRESIDENT
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**Testimony of Jeffrey B. Liebman,
Acting Deputy Director of the Office of Management and Budget
Before the Committee on the Judiciary, Subcommittee on The Constitution
United States Senate
May 26, 2010**

Chairman Feingold, Ranking Member Coburn, and Members of the Committee, thank you for inviting me to testify this morning about the President's new proposal, the Reduce Unnecessary Spending Act of 2010. This legislation would create an expedited procedure that guarantees an up or down vote on certain rescissions proposed by the President, helping to eliminate unnecessary spending and discouraging waste in the first place.

Since taking office, the Administration has made a priority of identifying and cutting unnecessary spending, proposing approximately \$20 billion of terminations, reductions, and savings both for fiscal year 2010 and 2011. While recent administrations have seen between 15 and 20 percent of their proposed discretionary cuts approved by Congress, we worked with Congress to enact 60 percent of proposed discretionary cuts for FY 2010. For that, I thank you and your colleagues.

Further, the Administration has worked with Congress to curb earmarks, and the appropriations bills for this year saw a significant decline in earmarks—a drop of 17 percent in volume and 27 percent in dollar value. These reductions build on the progress that Congress has made on earmarks since 2006, reductions prompted by a series of reforms that then-Senator Obama helped to write with Senator Coburn and others, which helped to bring more transparency and disclosure to the process.

In this year's Budget, the Administration also committed to restraining spending more broadly and has proposed a three-year freeze on non-security discretionary funding, saving \$250 billion over the next ten years relative to continuing the 2010 funding levels for these programs adjusted for inflation. This spending restraint complements other measures in the Budget that, together, produce more deficit reduction over the next ten years than any Budget has proposed in over a decade. Furthermore, the Administration proposed, and Congress enacted, statutory pay-as-you-go (PAYGO) legislation. PAYGO forces us to live by a simple but important principle—the Federal Government can only spend a dollar on an entitlement increase or tax cut if it saves a dollar elsewhere, which encourages the types of tough choices necessary to restore fiscal sustainability.

Significant progress has been made on cutting unnecessary spending, including earmarks, but more can be done. The President's proposal for expedited rescission would create an important tool for

reducing such spending. In short, the bill would provide the President with additional authority to propose a package of rescissions that would then receive expedited consideration in Congress and a guaranteed up-or-down vote.

In more detail, here's how it works:

- *Scope.* Under this new authority, the President can propose fast-track consideration of rescissions of discretionary and non-entitlement mandatory spending. The President is limited to proposing changes that reduce funding levels and cannot use this authority to propose other changes in law, including new transfer authority, supplemental funding, or changes in authorizing legislation. The fast-track process is thus limited only to simple funding reductions, for which a straight up-or-down vote is desirable.
- *Proposing a rescission package.* After enactment of funding, the President has 45 days during which Congress is in session (excluding weekends and national holidays) to decide whether to submit a rescission package using this expedited procedure. The President is also limited to a single package of rescissions per bill under this procedure, and the requested rescissions must be limited to provisions in that bill.¹
- *Congressional procedure.* A rescission package submitted under this authority receives fast-track consideration in Congress. Debate is limited in both houses and the package is guaranteed an up-or-down vote without amendment. The package is first introduced and considered in the House and, if approved there, is taken up in the Senate. From the package's introduction to its final vote in the Senate, the process can take no more than 25 days. Note that, while Congress cannot amend the package, our proposal enables Congress to omit from the bill any proposed rescission that it believes goes beyond the scope allowed.
- *Withholding funding.* Following submission of a rescission request using this expedited procedure, the President may withhold funding for up to 25 days, after which the funding must be released. This ensures that agencies do not obligate funds before Congress has had an opportunity to consider the rescission package.

In sum, the proposal provides the President with important, but limited, powers that will allow the President and Congress to work together more effectively to eliminate unnecessary spending including earmarks. Knowing this procedure exists may also discourage policymakers from enacting such spending in the first place.

¹ There is one exception to the packaging rule: when a single appropriations bill includes funding that is in the jurisdiction of more than one appropriations subcommittee such as in an omnibus appropriations bill. In that case, the President may submit up to two packages.

The proposal has been crafted to preserve the constitutional balance of power between the President and Congress. In 1996, Congress granted the President “line item veto” power over certain spending and tax bills, allowing the President to use his veto authority to strip out select provisions of legislation while signing the rest into law. The Supreme Court found this to violate the constitutional procedure for presenting a bill to the President for approval or veto of the entire bill. The Administration’s proposal is fundamentally different from this. Under our proposal, Congress, which is empowered to set its own rules, changes those rules under which it considers rescission packages proposed by the President—using well-established fast-track procedures. Rescissions only occur if Congress affirmatively enacts them into law. In other words, our proposal does not expand the Presidential veto authority in any way.

Our proposal also preserves the President’s two existing authorities for proposing rescissions. First, the President would retain the Constitutional authority to recommend legislation such as rescission packages to be considered under regular order in Congress. Second, the President would retain the power to recommend rescissions under the procedure already established under the Impoundment Control Act of 1974. This existing authority provides more limited fast-track protections to a Presidential rescission package than what we have proposed and, specifically, allows committee and floor amendments and so does not guarantee a clean up-or-down vote on a package submitted by the President.

A number of members from both parties, including the Chairman and Senator Carper who testified on the first panel, have introduced proposals that would, like our proposal, target unnecessary spending by fast-tracking consideration of rescissions. We applaud these efforts, and look forward to working with Congress to hammer out the details and enact this authority into law. In considering these proposals, one important issue is scope and, in particular, whether the new rescission authority is limited largely to earmarks. The Administration believes it is important to enable the President and Congress not only to reduce earmarks using expedited procedures but also to cut unnecessary spending more broadly, including from duplicative or overfunded programs.

We recognize that our proposal is not a magic bullet. While it lifts procedural barriers, the President and Congress will still have to make the tough choices to cut back unnecessary spending. Furthermore, restoring fiscal sustainability in the medium and long term will require not only targeting unnecessary spending in specific programs, which our proposal aids, but also making larger choices about overall budget priorities and revenue levels—a process now being facilitated by the President’s Fiscal Commission.

The Reduce Unnecessary Spending Act provides a new and important way for Congress and the President to ensure that taxpayer dollars are spent wisely. The Administration urges prompt and favorable consideration of our proposal, and we look forward to working with you on this matter in the coming weeks.

TO THE CONGRESS OF THE UNITED STATES:

Today, I am pleased to submit to the Congress the enclosed legislative proposal, the "Reduce Unnecessary Spending Act of 2010," along with a section-by-section analysis of the legislation.

This proposal will be another important step in restoring fiscal discipline and making sure that Washington spends taxpayer dollars responsibly. It will provide a new tool to streamline Government programs and operations, cut wasteful Government spending, and enhance transparency and accountability to the American people. The legislation will create an expedited procedure to rescind unnecessary spending and to broadly scale back funding levels if warranted. The legislation would require the Congress to vote up or down on legislation proposed by the President to rescind funding. This new, enhanced rescission authority will not only empower the President and the Congress to eliminate unnecessary spending, but also discourage waste in the first place.

Now more than ever, it's critical that taxpayer dollars are not wasted on programs that are ineffective, duplicative, or out-dated. In a time when American families and small business owners are conscious of every dollar and make sure that they manage their budgets wisely, the Federal Government can do no less. The American people expect and demand that we spend their money with the same discipline. Allowing taxpayer dollars to be wasted is both an irresponsible use of taxpayer funds and an irresponsible abuse of the public trust.

Recently, the Congress has taken welcome steps to curb wasteful spending. In 2007, when I served in the Senate, a bipartisan group worked together to eliminate anonymous earmarks

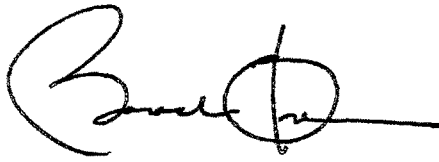
and brought new measures of transparency to the process so Americans can better follow how their tax dollars are being spent. Consequently, we have seen progress -- with earmarks declining since these reforms were passed, including during this past fiscal year.

In addition, my Administration undertook a line-by-line review of the Budget, and put forward approximately \$20 billion of terminations, reductions, and savings both for Fiscal Year 2010 and 2011. While recent administrations have seen between 15 to 20 percent of their proposed discretionary cuts approved by the Congress, for FY 2010, we worked with the Congress to enact 60 percent of proposed cuts.

Despite the progress we have made to reduce earmarks and other unnecessary spending, there is still more work to be done. The legislation I am sending to you today provides an important tool. The legislation allows the President to target spending policies that do not have a legitimate and worthy public purpose by providing the President with an additional authority to propose the elimination of wasteful or excessive funding. These proposals then receive expedited consideration in the Congress and a guaranteed up-or-down vote. This legislation would also allow the President to delay funding for these projects until the Congress has had the chance to consider the changes. In addition, this proposal has been crafted to preserve the constitutional balance of power between the President and the Congress.

Overall, the "Reduce Unnecessary Spending Act of 2010" provides a new way for the Congress and the President to manage taxpayer dollars wisely. That is why I urge the prompt and

favorable consideration of this proposal, and look forward to working with the Congress on this matter in the coming weeks.

A handwritten signature in black ink, appearing to be "Barack Obama", with a large circular flourish on the left and a horizontal line extending to the right.

THE WHITE HOUSE,
May 24, 2010.

1 A bill to provide an optional fast-track procedure the President may use when submitting rescission
2 requests, and for other purposes.

3

4 *Be it enacted by the Senate and House of Representatives of the United States of America in*
5 *Congress assembled,*

6

CHAPTER 1: EXPEDITED RESCISSIONS

7

SECTION 1. TITLE AND PURPOSES.

9

(a) Short Title.—This Act may be cited as the “Reduce Unnecessary Spending Act of 2010”.

10

(b) Purpose.—This Act creates an optional fast-track procedure the President may use when
11 submitting rescission requests, which would lead to an up-or-down vote by Congress on the President’s
12 package of rescissions, without amendment.

13

SECTION 2. RESCISSIONS OF FUNDING.

14

Part C of the Impoundment Control Act of 1974 is amended to read as follows.—

16

17 “SECTION 1021. APPLICABILITY AND DISCLAIMER.—The rules, procedures, requirements, and
18 definitions in this Part apply only to executive and legislative actions explicitly taken under this Part.
19 They do not apply to actions taken under Part B or to other executive and legislative actions not taken
20 under this Part.

21

“SECTION 1022. DEFINITIONS.

22

(1) The terms “appropriations Act”, “budget authority”, and “new budget authority” have the same
23 meanings as in section 3 of the Congressional Budget Act of 1974.

24

(2) The terms “account”, “current year”, “CBO”, and “OMB” have the same meanings as in
25 section 250 of the Balanced Budget and Emergency Deficit Control Act of 1985 as in effect on September
26 30, 2002.

27

(3) Under this Part, “days of session” shall be calculated by excluding weekends and national
28 holidays; and any day during which a chamber of Congress is not in session shall not be counted as a day
29 of session of that chamber; and any day during which neither chamber is in session shall not be counted as
30 a day of session of Congress.

31

(4) The term “entitlement law” means the statutory mandate or requirement of the United States to
32 incur a financial obligation unless that obligation is explicitly conditioned on the appropriation in
33

1 subsequent legislation of sufficient funds for that purpose, and the Supplemental Nutrition Assistance
2 Program.

3 (5) The term “funding” refers to new budget authority and obligation limits except to the extent
4 that the funding is provided for entitlement law.

5 (6) The term “rescind” means to eliminate or reduce the amount of enacted funding.

6 (7) The terms “withhold” and “withholding” apply to any executive action or inaction that
7 precludes the obligation of funding at a time when it would otherwise have been available to an agency
8 for obligation. The term does not include administrative or preparatory actions undertaken prior to
9 obligation in the normal course of implementing budget laws.

10

11 “SECTION 1023. TIMING AND PACKAGING OF RESCISSION REQUESTS.

12 (a) Timing.—Whenever the President proposes that Congress rescind funding under the
13 procedures in this Part, OMB shall transmit a message to Congress containing the information specified in
14 section 1024, and the message transmitting the proposal shall be sent to Congress no later than 45 days of
15 session of Congress after the date of enactment of the funding.

16 (b) Packaging and Transmittal of Requested Rescissions.—Except as provided in subsection (c),
17 for each piece of legislation that provides funding, the President shall request at most one package of
18 rescissions and the rescissions in that package shall apply only to funding contained in that legislation.
19 OMB shall deliver each message requesting a package of rescissions to the Clerk of the House of
20 Representatives if the House is not in session and to the Secretary of the Senate if the Senate is not in
21 session. OMB shall make a copy of the transmittal message publicly available, and shall publish in the
22 Federal Register a notice of the message and information on how it can be obtained.

23 (c) Special Packaging Rules.—After enactment of

24 (1) a joint resolution making continuing appropriations,

25 (2) a supplemental appropriations bill, or

26 (3) an omnibus appropriations bill,

27 covering some or all of the activities customarily funded in more than one regular appropriations bill, the
28 President may propose as many as two packages rescinding funding contained in that legislation, each
29 within the 45-day period specified in subsection (a). OMB shall not include the same rescission in both
30 packages, and, if the President requests the rescission of more than one discrete amount of funding under
31 the jurisdiction of a single subcommittee, OMB shall include each of those discrete amounts in the same
32 package.

33

1 “SECTION 1024. REQUESTS TO RESCIND FUNDING.

2 For each request to rescind funding, the transmittal message shall specify—

- 3 (1) the dollar amount to be rescinded;
- 4 (2) the agency, bureau, and account from which the rescission shall occur;
- 5 (3) the program, project, or activity within the account (if applicable) from which the rescission
- 6 shall occur;
- 7 (4) the amount of funding, if any, that would remain for the account, program, project, or activity
- 8 if the rescission request is enacted; and
- 9 (5) the reasons the President requests the rescission.

10 In addition, OMB shall designate each separate rescission request by number and shall include proposed

11 legislative language to accomplish the requested rescission. The proposed legislative language shall not

12 include any changes in existing law other than the rescission of funding, and shall not include any

13 supplemental appropriations, transfers, or reprogrammings.

14

15 “SECTION 1025. GRANTS OF AND LIMITATIONS ON PRESIDENTIAL AUTHORITY.

16 (a) Presidential Authority to Withhold Funding.—If the President proposes a rescission of funding

17 under this Part, then notwithstanding any other provision of law, OMB is hereby authorized, subject to the

18 time limits of subsection (c), to temporarily withhold that funding from obligation.

19 (b) Expedited Procedures Available only Once per Bill.—The President may not invoke the

20 procedures of this Part, or the authority to withhold funding granted by subsection (a), on more than one

21 occasion for any Act providing funding.

22 (c) Time Limits.—OMB shall make available for obligation any funding withheld under

23 subsection (a) on the earliest of—

- 24 (1) the day on which the President determines that the continued withholding or reduction
- 25 no longer advances the purpose of legislative consideration of the rescission request;
- 26 (2) starting from the day on which OMB transmitted a message to Congress requesting the
- 27 rescission of funding, 25 calendar days in which the House of Representatives has been in session
- 28 or 25 calendar days in which the Senate has been in session, whichever occurs second; or
- 29 (3) the last day after which the obligation of the funding in question can no longer be fully
- 30 accomplished in a prudent manner before its expiration.
- 31

32 “SECTION 1026. CONGRESSIONAL CONSIDERATION OF RESCISSION REQUESTS.

1 (a) Preparation of Legislation to Consider a Package of Expedited Rescission Requests.—When
 2 the House of Representatives receives a package of expedited rescission requests, the Clerk shall prepare
 3 a House bill that only rescinds the amounts requested. The bill shall read as follows:

4 “There is hereby enacted the rescissions numbered [insert number or numbers] as set forth in the
 5 Presidential message of [insert date] transmitted under Part C of the Impoundment Control Act of
 6 1974 as amended.”

7 The Clerk shall include in the bill each numbered rescission request listed in the Presidential package in
 8 question, except that the Clerk shall omit a numbered rescission request if the Chairman of the House
 9 Budget Committee, after consulting with the Senate Budget Committee, CBO, GAO, and the House and
 10 Senate committees that have jurisdiction over the funding, determines that the numbered rescission does
 11 not refer to funding or includes matter not permitted under a request to rescind funding.

12 (b) Introduction and Referral of Legislation to Enact a Package of Expedited Rescissions.—The
 13 majority leader or the minority leader of the House or Representatives, or a designee, shall (by request)
 14 introduce each bill prepared under subsection (a) not later than 4 days of session of the House after its
 15 transmittal, or, if no such bill is introduced within that period, any member of the House may introduce
 16 the required bill in the required form on the fifth or sixth day of session of the House after its transmittal.
 17 When such an expedited rescission bill is introduced in accordance with the prior sentence, it shall be
 18 referred to the House committee of jurisdiction. A copy of the introduced House bill shall be transmitted
 19 to the Secretary of the Senate, who shall provide it to the Senate committee of jurisdiction.

20 (c) House Report and Consideration of Legislation to Enact a Package of Expedited
 21 Rescissions.—The House committee of jurisdiction shall report without amendment the bill referred to it
 22 under subsection (b) not more than 5 days of session of the House after the referral. The Committee may
 23 order the bill reported favorably, unfavorably, or without recommendation. If the Committee has not
 24 reported the bill by the end of the 5-day period, the Committee shall be automatically discharged from
 25 further consideration of the bill and it shall be placed on the appropriate calendar.

26 (d) House Motion to Proceed. —After a bill to enact an expedited rescission package has been
 27 reported or the committee of jurisdiction has been discharged under subsection (c), it shall be in order to
 28 move to proceed to consider the bill in the House. A Member who wishes to move to proceed to
 29 consideration of the bill must announce that fact, and the motion to proceed shall be in order only during a
 30 time designated by the Speaker within the legislative schedule for the next calendar day of legislative
 31 session or the one immediately following it. If the Speaker does not designate such a time, then 3 or more
 32 calendar days of legislative session after the bill has been reported or discharged, it shall be in order for
 33 any Member to move to proceed to consider the bill. A motion to proceed shall not be in order after the

1 House has disposed of a prior motion to proceed with respect to that package of expedited rescissions.
 2 The previous question shall be considered as ordered on the motion to proceed, without intervening
 3 motion. A motion to reconsider the vote by which the motion to proceed has been disposed of shall not
 4 be in order. If 5 calendar days of legislative session have passed since the bill was reported or discharged
 5 under this subsection and no Member has made a motion to proceed, the bill shall be removed from the
 6 calendar.

7 (e) House Consideration.—A bill consisting of a package of rescissions shall be considered as
 8 read. All points of order against the bill are waived, except that a point of order may be made that one or
 9 more numbered rescissions included in the bill would enact language containing matter not requested by
 10 the President or not permitted under this Act as part of that package. If the Presiding Officer sustains such
 11 a point of order, the numbered rescission or rescissions that would enact such language are deemed to be
 12 automatically stripped from the bill and consideration proceeds on the bill as modified. The previous
 13 question shall be considered as ordered on the bill to its passage without intervening motion, except that 4
 14 hours of debate equally divided and controlled by a proponent and an opponent are allowed, as well as
 15 one motion to further limit debate on the bill. A motion to reconsider the vote on passage of the bill shall
 16 not be in order.

17 (f) Senate Consideration.—If the House of Representatives approves a House bill enacting a
 18 package of rescissions, that bill as passed by the House shall be sent to the Senate and referred to the
 19 Senate Committee of jurisdiction. That Committee shall report without amendment the bill referred to it
 20 under this subsection not later than 3 days of session of the Senate after the referral. The Committee may
 21 order the bill reported favorably, unfavorably, or without recommendation. If the Committee has not
 22 reported the bill by the end of the 3-day period, the Committee shall be automatically discharged from
 23 further consideration of the bill and it shall be placed on the appropriate calendar. On the following day
 24 and for 3 subsequent calendar days in which the Senate is in session, it shall be in order for any Senator to
 25 move to proceed to consider the bill in the Senate. Upon such a motion being made, it shall be deemed to
 26 have been agreed to and the motion to reconsider shall be deemed to have been laid on the table. Debate
 27 on the bill in the Senate under this subsection, and all debatable motions and appeals in connection
 28 therewith, shall not exceed 10 hours, equally divided and controlled in the usual form. Debate in the
 29 Senate on any debatable motion or appeal in connection with such a bill shall be limited to not more than
 30 1 hour, to be equally divided and controlled in the usual form. A motion to further limit debate on such a
 31 bill is not debatable. A motion to amend such a bill or strike a provision from it is not in order. A motion
 32 to recommit such a bill is not in order.

(g) Senate Point of Order.—It shall not be in order for the Senate to employ the procedures in this Part while considering a bill approved by the House enacting a package of rescissions under this Part if any numbered rescission in the bill would enact matter not requested by the President or not permitted under this Act as part of that package. If a point of order under this section is sustained, consideration of the bill shall no longer be governed by subsection (f); instead, consideration shall be governed by the Standing Rules of the Senate and any other rules applicable to Senate consideration of legislation.

SECTION 3. TECHNICAL AND CONFORMING AMENDMENTS

(a) Table of Contents.—Subsection 1(b) of the Congressional Budget Act of 1974 is amended by altering the section numbers and names in accordance with the amendments made by this Act.

(b) Title.—The title of Part C of the Impoundment Control Act of 1974 is amended to read “Expedited Consideration of Proposed Rescissions”.

(c) Temporary Withholding.—In section 1013(c) of the Impoundment Control Act of 1974, strike “section 1012.” and insert “section 1012 or section 1025.”

(d) Rulemaking.—Section 904(a) of the Congressional Budget Act of 1974 is amended by striking “and 1017” and inserting “1017, and 1026” and section 904(d)(1) is amended by striking “or section 1017” and inserting “or section 1017 or 1026”.

SECTION 4. EXPIRATION.

Part C of the Impoundment Control Act of 1974 (as amended by this Act) shall expire on December 31, 2014.

CHAPTER 2. AMENDMENTS TO PART A OF THE IMPOUNDMENT CONTROL ACT.

Immediately after section 1001 of the Impoundment Control Act of 1974, insert the following—
“SECTION 1002. RESCINDED FUNDS.

If budget authority is rescinded under Part B or funding is rescinded under Part C, the amount so rescinded shall revert to the fund whence it came (general fund, trust fund, special fund, revolving fund, and so on as applicable), except to the extent legislation specifies otherwise.

“SECTION 1003. SEVERABILITY.

If the judicial branch of the United States finally determines that one or more of the provisions of Parts B or C violate the Constitution of the United States, the remaining provisions of those Parts shall continue in effect.”

**Section-by-Section Analysis and Explanation of the
“Reduce Unnecessary Spending Act of 2010”**

May 24, 2010

Summary.

Chapter 1 establishes a special process under which the President may request the rescission of funding contained in a newly enacted bill. This commonly occurs in appropriations bills, but sometimes other bills include non-entitlement funding, which is also subject to this act. The Congress must then consider those requests in a package (generally one package per newly enacted bill) under an expedited procedure leading to a guaranteed, up-or-down vote on the entire package without amendment. While the Congress cannot amend the package, it would omit from the bill any proposed rescission containing matter that goes beyond the limited types of rescission requests permitted under this new process.

This new process takes the place of Part C of the Impoundment Control Act (the Line-Item Veto Act of 1996, which the Supreme Court struck down in 1998), and expires at the end of 2014.

Chapter 2 clarifies legal questions.

Nothing in this bill affects the President’s right to propose whatever legislation he chooses under standard procedures, or the Congress’s right to consider (or not consider) standard legislative proposals under standard procedures.

Under this bill, the President would have two procedures to choose between, as well as the standard procedures, if he wants the Congress to take a second look at funding legislation: a) the new, expedited, up-or-down procedures created by this Act, and b) the procedures under the existing Impoundment Control Act of 1974. There are four main differences between the procedures under this new Act and the Impoundment Control Act:

- The new Act requires that proposed rescissions be submitted relatively shortly after an appropriations law or other law providing non-entitlement funding is enacted;
- The new Act requires the Congress to consider proposed rescissions stemming from such a new law in a *package*;
- The new Act does not permit the Congress to amend the President’s package of rescissions; and
- The new Act guarantees the President an up-or-down-vote on his package.

Section-by-Section Analysis and Explanation.

Chapter 1: Expedited Rescissions

Section 1 creates a short title, the Reduce Unnecessary Spending Act of 2010, and briefly states the purpose: creating a new option for the President, a guaranteed up-or-down vote on his package, without amendment.

Section 2 repeals the unconstitutional Line-Item Veto Act of 1996 by replacing it in its entirety with the new, expedited process described in the summary. The Line-Item Veto Act had been created in 1996 as Part C of the Impoundment Control Act (ICA), so the new expedited process becomes the new Part C of the ICA. Within this new Part C of the ICA, the new process is set forth in six sections:

- Section 1021. Applicability and Disclaimer
- Section 1022. Definitions
- Section 1023. Timing and Packaging of Rescission Requests
- Section 1024. Requests to Rescind Funding
- Section 1025. Grants of and Limitations on Presidential Authority
- Section 1026. Congressional Consideration of Rescission Requests

Section 1021, Applicability and Disclaimer, makes clear that the new fast-track process created by the new Part C of the ICA is an optional alternative to standard executive-legislative procedures and to Part B of the ICA, the process created in 1974. Section 1021 also says that any definitions of terms, or any requirements or limitations on the President or on the Congress, apply *only* for the purposes of this new fast-track process; that is, they apply only if the President explicitly invokes Part C when requesting the Congress to consider a package of rescissions.

Section 1022, Definitions, sets forth and defines the terms used under the new section. The majority are defined by simple cross-references to the standard definitions used in other budget laws. Three definitions deserve comment.

First, “funding” covers new budget authority and obligation limits, except to the extent that the funding is used to pay entitlement benefits. Discretionary appropriations are therefore the most common form of funding. However, the term also covers budget authority provided by legislation other than appropriations acts as long as that funding does not pay entitlement benefits.

Second, the term “entitlement law” is defined. This is essential to the definition of “funding” (which is defined as not covering entitlement law). The key to the definition is that an entitlement exists when a provision of law mandates that payments be made even if the funding needed to make those payments, to be provided in a subsequent law, is inadequate or nonexistent.¹ In addition, the term is applied to the Supplemental Nutrition Assistance Program

¹ Sometimes the same law that establishes a mandate in one provision conditions that mandate on the availability of funding – and then provides the funding in a separate section of the same law. In this case, the law is an entitlement if the first

(formerly the food stamp program), which does not meet the definition of entitlement but has been treated as mandatory by every administration for the last three decades and was defined that way in the Budget Enforcement Act of 1990.

Third, “rescind” means to eliminate *or reduce*. This is the standard interpretation. Thus, if an appropriations Act provides \$185 million for a program, the President can request the Congress to reduce that amount to, for instance, \$170 million by rescinding \$15 million of the appropriated funds. Or he could request the amount be reduced to zero – and the program eliminated – by rescinding all \$185 million.

Section 1023, Timing and Packaging of Rescission Requests, describes how the new process starts. After enactment of funding, the President has 45 days during which the Congress is in session (excluding weekends and national holidays) to decide whether to invoke the new procedures laid out in Part C by requesting the Congress to enact one or more rescissions, to prepare the legislative language that would accomplish the rescissions, and to transmit the rescission requests in a package to the Congress. Only by adhering to the time limits and other procedures and constraints specified in Part C does the President trigger the fast-track consideration described in section 1026.

Section 1023(b) limits the President to a single package of rescissions per bill, and the rescissions he requests must be limited to provisions in that bill. For example, when an appropriations bill is enacted, the President may choose to invoke Part C and transmit a package of one or more rescissions of the funding provided in that bill.

There are exceptions to the packaging rule just described when a single appropriations bill includes funding that is in the jurisdiction of more than one subcommittee of the Appropriations Committees. This most commonly happens in supplemental, omnibus, or continuing appropriations. In this case, the President may (but need not) send up two rather than one package of rescission requests after the enactment of that appropriations bill. If he chooses two packages, one package would address rescissions related to one set of subcommittees and the other package would address rescissions related to the other subcommittees.²

Section 1024, Requests to Rescind Funding, lists the explanatory information required to be included for each individual rescission request contained within a package of rescissions, including the President’s reason for requesting the rescission. The section requires the President to number each separate rescission request and to propose the precise legislative language needed to effectuate it. Importantly, it restricts that language to accomplishing the rescission but to no other purpose: for example, the language cannot change how remaining funds are used or include supplemental funding. Since the Congress is required to vote on the rescission requests without amendment, each request must be clean: the request must do no more than reduce or eliminate an amount of funding that the underlying bill had provided for a specific budget account or for a program, project, or activity within that account. Frequently, funding provided within a budget account is intended for multiple programs, projects, or activities that are spelled out in report language or elsewhere. Just as report language

provision is a clear mandate *aside from* the conditionality, but is not an entitlement if the first condition merely establishes the purposes for which the funding provided elsewhere in the statute is authorized to be used.

² The President could not propose rescissions of some programs or amounts provided by a single subcommittee in one package and other programs or amounts provided by the same subcommittee in the other package; neither could he propose the same rescissions twice, once in one package and once in the other.

spells out the intended use of appropriated funding, the message transmitted by the President spells out the program, project, or activity to which the rescission of funding is intended to apply.

Section 1025, Grants of and Limitations on Presidential Authority, authorizes but does not require the President to withhold funding from obligation while the Congress considers his rescission request under Part C.

This section is analogous to existing authority under Part B. The authority exists because there is little point in allowing funds that are about to be rescinded by the Congress to instead be obligated by an agency, making their rescission impossible. But because the process is expedited, any withholding is limited to 25 calendar days in which the House or Senate is in session (whichever is greater).³ Weekends and national holidays do not count. The President is explicitly required to release funds once that period expires, and is encouraged to release them if either House defeats his rescission package. This section also states that if the President proposes a specific rescission under Part C, he may do so only once; if he is turned down, he cannot ask again. However, if he is turned down under Part C, he can invoke the regular ICA (Part B) or his general authority to request legislation.

Moreover, section 1025(c)(3) says that the authority to withhold funds does not apply so late in a fiscal year that a withholding would lead to the funds expiring or to an agency no longer being able to prudently obligate the funds before they expire. Late withholding would be a rarity in any case, because regular appropriations bills are normally enacted before the start of the fiscal year or shortly thereafter and section 1023 requires any presidential rescission package to be transmitted within 45 days of session after enactment of the bill. However, a supplemental appropriations bill enacted late in the fiscal year (for example) could conceivably provide funds that would be subject to paragraph 3.

Section 1026, Congressional Consideration of Rescission Requests, sets forth the expedited procedures in the House and Senate for consideration of proposed rescission packages. In general, these procedures are designed to insure that the President gets a vote, without amendment, on the package of rescissions he transmits.⁴

Because appropriations legislation originates in the House by longstanding tradition, the House turns each presidential rescission package into a statute and considers it first. The Senate acts on the package only if the House passes it, since even under expedited procedures Senate action proceeds at a slower pace and votes take longer. The Senate is not required to vote on a package the House has already defeated.

There are three principal ways in which the House and Senate fast-track procedures differ from other fast-track, no-amendment procedures that exist or have existed in recent decades.

First, the House clerk – who turns the presidential rescission package into a bill – omits individual rescissions that are not eligible for the fast track procedure. The rescission bill itself will be very short, since it will simply list the items in the President's package by number and state that they are enacted into law. The clerk omits numbered rescissions that the Chairman of the House Budget Committee

³ The expedited procedures under §1026 mean that Congress will reach a final resolution on the President's rescission package before the 25 days expire.

⁴ There is no method to provide an absolute guarantee of a vote, because all rules of the House and Senate are implemented by persons making motions under the rules. If *no one* moves to consider a piece of legislation, it will not be considered.

determines are not permissible for the fast track procedure. The Chairman is required to consult widely, including with the Senate Budget Committee, the committees of jurisdiction in both Houses, CBO, and GAO in making determinations. Examples of impermissible rescission requests include but are not limited to:

- a request to rescind funding that was not provided in the recently enacted funding bill in question but rather in some other bill;
- a request to rescind funding where the account from which the funding is to be cut is not adequately specified in legislative language, or the program, project, or activity within an account from which the funding is to be cut is not adequately identified in the presidential message;
- a request to rescind funding for an entitlement program;
- a request to rescind funding that is by itself a valid request but for which the President's legislative text includes other matter (such as transfer authority, or supplemental funding, or changes in authorizing legislation).

Second, any individual House member may raise a point of order against any numbered rescission in the package on the grounds that it contains impermissible matter, and if the point of order is sustained, the item is automatically knocked out of the package.

Finally, any individual Senator may raise a point of order claiming that the House-passed package contains impermissible matter; if sustained, the package is not altered but does immediately lose its fast-track, no-amendment protection; at that point, the special procedures in section 1026(f) cease to apply. Continued debate on the package would take place under standard Senate rules.⁵ This approach gives the Senate (including the Senate minority) equal weight with the House in determining whether rescission requests go beyond the clear limitations of Part C.

These provisions may prompt a consultation between the branches before a package of rescissions is submitted and between the House and Senate after it is submitted, leading to a package that is clearly within the boundaries set forth in this Part. The intent is that each bill employing the fast-track procedures of this Act be a "clean" bill.

Section 3 makes technical and conforming amendments.

Subsections (a) and (b) make conforming amendments to the titles and table of contents of the Congressional Budget and Impoundment Control Act of 1974, Title X of which constitutes the ICA.

Subsection (c) is a conforming amendment to section 1013 of the ICA, a part of which specifies that the President's general authority to temporarily defer the use of funding is limited to routine administrative actions and certain defined circumstances. The existing ICA specifies that a temporary

⁵ At that point, the Senate could (for example) amend the bill, or filibuster it, or table it. If the Senate amends and then passes the bill, the parliamentary situation with respect to both the House and Senate is normal: a bill has been passed in different form by the two bodies, and differences can be resolved through conference or amendments between the bodies in the normal fashion.

deferral is permissible during the 45-day period when the Congress may be considering a rescission request under Part B. This new subsection conforms the new Part C to Part B by adding the analogous 25-day withholding period created by section 1025 of the new Part C.

Subsection (d) specifies that the portions of this Act that establish or alter rules and procedures of the House and Representatives or the Senate are themselves amendable by the House and Senate in the normal fashion, for example, by agreement to a simple or concurrent resolution. This is the standard interpretation of the Constitution in any case.

Section 4 sunsets the new procedures by saying that Part C of the ICA, which is where Section 2 of this Act locates the new procedures, expires at the end of 2014.

Chapter 2: Amendments to Part A of the Impoundment Control Act

This chapter creates two new sections of the ICA, to address legal issues that were ambiguous or may have become so over time. It places these sections in Part A of the ICA since they apply generally.

Section 1002, Rescinded Funds, specifies that if budget authority (the term used in Part B) or funding (the analogous Part C term) is rescinded, the rescinded amounts return to the funds from which they had been provided. For example, money rescinded from a special-fund account would return to that special fund rather than being placed in the general fund of the Treasury. This approach keeps faith with laws dedicating specific revenues or offsetting collections to specific funds. Without this new section, the issue would have been unclear.

Section 1003, Severability, specifies that the various provisions of the ICA are severable if any are held unconstitutional. Constitutional law regarding issues of congressional-executive relations has changed to some extent since the ICA was enacted in 1974, so what was clear at the time may be less clear now. The intent, though, is that if the courts determine that some duty, authority, procedure, or requirement under the ICA is held unconstitutional, the remaining portions of the ICA should continue in place.

THE REDUCE UNNECESSARY SPENDING ACT OF 2010: FACT SHEET
May 23, 2010
FOR BACKGROUND USE ONLY

The President is sending to Congress on Monday the Reduce Unnecessary Spending Act of 2010 to establish a new tool to reduce unnecessary or wasteful spending. Under this new expedited procedure, the President would submit a package of rescissions shortly after a spending bill is passed. Congress would be required to consider these recommendations as a package, without amendment, and with a guaranteed up-or-down vote within a specified timeframe.

This new, expedited rescission authority will empower the President and the Congress to eliminate unnecessary spending while discouraging waste in the first place.

Specifically, this expedited rescission authority will replace Part C of the Impoundment Control Act of 1974 – the line-item veto provisions struck down by the Supreme Court in 1998 – and will operate alongside current rescission authority.

The three main differences between the expedited rescission authority in the Reduce Unnecessary Spending Act and current authority are:

- The proposed legislation requires that a package of proposed rescissions be submitted promptly, within 45 congressional working days after an appropriations law providing funding is enacted;
- The proposed legislation does not permit the Congress to amend the President's package of rescissions; and
- The proposed legislation guarantees the President an up-or-down-vote on the package of rescissions by setting time limits for debate in the House and Senate.

The expedited rescission authority in the Reduce Unnecessary Spending Act would be particularly effective in reining in programs that are heavily earmarked or not merit-based as well as those that are plainly wasteful and duplicative. For instance, the State Assistance Grants for Water Infrastructure at the Environmental Protection Agency currently consists of \$157 million in non-merit-based, earmarked funding instead of being allocated through the regular formula allocation process. Similarly, the Department of Transportation was given \$293 million for earmarked surface transportation projects that also circumvent formula grant funding. The Department of Commerce was allocated \$20 million and the USDA was given \$5 million to fund public broadcasting even though this activity is ably supported through the Corporation for Public Broadcasting. Also, the Department of Housing and Urban Development was allocated \$17 million for the Brownfields Economic Development Initiative, a worthy goal that duplicates the function of the CDBG program. These are just a few examples of some of the unnecessary programs that an expedited rescission package could contain.

The Reduce Unnecessary Spending Act of 2010 is part of a larger effort the President has undertaken to rein in wasteful spending:

- In its FY 2010 and 2011 Budgets, the Administration has proposed approximately \$20 billion of terminations, reductions, and savings for each year. While recent administrations have seen between 15 to 20 percent of their proposed discretionary cuts approved by Congress, this Administration worked with Congress to enact 60 percent of proposed discretionary cuts for FY 2010.
- The Administration has worked with Congress to curb earmarks, and the appropriations bills for Fiscal Year 2010 saw a significant decline in earmarks—a drop of 17 percent in volume and 27 percent in dollar value.
- The President signed into law statutory pay-as-you-go (PAYGO) legislation. PAYGO forces us to live by a simple but important principle: Congress can spend a dollar on an entitlement increase or tax cut only if it saves a dollar elsewhere.
- The President has charged federal departments and agencies with saving \$40 billion annually by Fiscal Year 2011 through terminating unnecessary contracts, strengthening acquisition management, and reducing the use of high-risk contracts across government.
- The President signed an Executive Order to curb the \$100 billion in improper payments that go out from the federal government each year. One key part of this effort is the expansion of payment recapture audits, investigations in which specialized private sector auditors scrutinize government payments and then find and reclaim taxpayer funds made in error or gained through fraud. Since these auditors can be compensated based on the amount of reclaimed improper payments they identify, there is a powerful incentive to find every error.
- In this year's Budget, the Administration also committed to restraining spending more broadly and has proposed a three-year freeze on non-security discretionary funding, saving \$250 billion over the next 10 years relative to continuing the 2010 funding levels for these programs adjusted for inflation. This spending restraint complements other measures in the Budget that, together, produce more deficit reduction over the next 10 years than any Budget has proposed in over a decade.



Item Veto and Expanded Impoundment Proposals: History and Current Status

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Summary

Conflicting budget priorities of the President and Congress accentuate the institutional tensions between the executive and legislative branches inherent in the federal budget process. Impoundment, whereby a President withholds or delays the spending of funds appropriated by Congress, provides an important mechanism for budgetary control during budget implementation in the executive branch; but Congress retains oversight responsibilities at this stage as well. Many Presidents have called for an item veto, or possibly expanded impoundment authority, to provide them with greater control over federal spending.

The Impoundment Control Act of 1974 (Title X of P.L. 93-344), established two categories of impoundments: deferrals, or temporary delays in funding availability; and rescissions, or permanent cancellation of budget authority. With a rescission, the funds must be made available for obligation unless both houses of Congress take action to approve the President's rescission request within 45 days of "continuous session."

Consideration of impoundment reform increasingly became joined with that of an item veto for the President. While Constitutional amendment proposals have not disappeared (see H.J.Res. 15), many who originally favored an item veto constitutional amendment turned to expanded rescission authority for the President as a functionally similar mechanism achievable more easily by statutory change.

The Line Item Veto Act was signed into law on April 9, 1996 (P.L. 104-130), and it became effective January 1, 1997. Key provisions allowed the President to cancel any dollar amount of discretionary budget authority, any item of new direct spending, or certain limited tax benefits contained in any law, unless disapproved by Congress. On June 25, 1998, the Supreme Court, in the case of *Clinton v. City of New York*, held the law unconstitutional on the grounds that it violated the presentment clause; in order to grant the President true item veto authority, a constitutional amendment would be needed (according to the majority opinion).

Measures seeking to provide a constitutional alternative to the 1996 law have been introduced in each subsequent Congress. In the 109th Congress, the House passed H.R. 4890, the Legislative Line Item Veto Act of 2006, by a vote of 247-172, but no further action on the measure occurred before the 109th Congress adjourned.

Several measures have been introduced in the 111th Congress that would establish expedited rescission procedures, including H.R. 1294, H.R. 1390, H.R. 4921, S. 524, S. 640, and S. 907. Other proposals would provide for expedited rescission along with various other budget process reforms, such as increased earmark accountability or spending controls. In the 111th Congress, H.R. 3268, H.R. 3964, S. 1808, and S. 3026 provide examples of such omnibus budget process bills. Two constitutional amendment proposals have been introduced, H.J.Res. 15 and S.J.Res. 22. On December 16, 2009, there was a Senate hearing on bills providing for expedited rescission authority. The Obama Administration has endorsed an expedited process for congressional consideration of rescission requests and announced on May 24, 2010, the transmittal of a draft bill to Congress, titled "Reduce Unnecessary Spending Act of 2010."

This report will be updated as events warrant.

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Background

Debate about the appropriate relationship between the branches in the federal budget process seems inevitable, given the constitutional necessity of shared power in this sphere. Under the Constitution, Congress possesses the “power of the purse” (“No money shall be drawn from the Treasury but in consequence of appropriations made by law”), but the President enjoys broad authority as the chief executive who “shall take care that the laws be faithfully executed.”

The Constitution is silent concerning the specifics of a budget system for the federal government. Informal procedures sufficed for many years. The Budget and Accounting Act of 1921 (P.L. 67-14) for the first time required the President to submit a consolidated budget recommendation to Congress. To assist in this task, the act also created a new agency, the Bureau of the Budget, “to assemble, correlate, revise, reduce, or increase the estimates of the several departments or establishments.” In 1970, the budget agency was reconstituted as the Office of Management and Budget (OMB).¹ OMB also plays an important role later in the budget process when funds are actually spent as appropriations laws are implemented. Impoundment of funds by the President represents an important component in this stage of budget execution.

Presidential impoundment actions have sometimes been controversial. The subject of granting the President item veto authority, akin to that exercised by 43 governors, also has elicited considerable debate. With an item veto, the executive can delete specific provisions in a piece of legislation presented for signature, and then proceed to sign the measure into law.²

Brief History of Impoundment

Impoundment includes any executive action to withhold or delay the spending of appropriated funds. One useful distinction among impoundment actions, which received statutory recognition in the 1974 Impoundment Control Act, focuses on duration: whether the President’s intent is permanent cancellation of the funds in question (rescission) or merely a temporary delay in availability (deferral).

Another useful contrast distinguishes presidential deferrals for routine administrative reasons from deferrals for policy purposes. Virtually all Presidents have impounded funds in a routine manner as an exercise of executive discretion to accomplish efficiency in management. The creation of budgetary reserves as a part of the apportionment process required by the Antideficiency Acts (31 U.S.C. 1511-1519) provided formal structure for such routine impoundments, which originated with an administrative regulation issued in 1921 by the Bureau of the Budget and then received a statutory base in 1950.³ Impoundments for policy reasons, such

¹ For background on the 1921 law, the Bureau of the Budget, and the creation of OMB, see Larry Berman, *The Office of Management and Budget and the Presidency, 1921-1979* (Princeton, NJ: Princeton University Press, 1979); and Frederick C. Mosher, *A Tale of Two Agencies* (Baton Rouge, LA: Louisiana State University Press, 1984). For a brief introduction to OMB at present, see CRS Report RS21665, *Office of Management and Budget (OMB): A Brief Overview*, by Clinton T. Brass.

² Various statutory alternatives such as expedited rescission are sometimes referred to as giving the President a “line item veto.” This usage is not technically correct, but serves to call attention to some functional similarities between the two mechanisms.

³ See Budget and Accounting Procedures Act of 1950, P.L. 81-784, 64 Stat. 2317.

as opposition to a particular program or a general desire to reduce spending, whether short-term or permanent, have proved far more controversial.

Controversies Increase

Instances of presidential impoundment date back to the early nineteenth century, but Presidents typically sought accommodation rather than confrontation with Congress.⁴ In the 1950s and 1960s, disputes over the impoundment authority resulted from the refusal of successive Presidents to fund certain weapons systems to the full extent authorized by Congress. These confrontations between the President and Congress revolved around the constitutional role of Commander-in-Chief and tended to focus on relatively narrow issues of weapons procurement. President Johnson made broader use of his power to impound by ordering the deferral of billions of dollars of spending during the Vietnam war in an effort to restrain inflationary pressures in the economy. While some impoundments during these periods were motivated by policy concerns, they typically involved temporary spending delays, with the President acting in consultation with congressional leaders, so that a protracted confrontation between the branches was avoided.

Conflict over the use of impoundments greatly increased during the Nixon Administration and eventually involved the courts as well as Congress and the President. In the 92nd and 93rd Congresses (1971-1974), the confrontation intensified as the President sought to employ the tool of impoundment to reorder national priorities and alter programs previously approved by Congress. Following President Nixon's reelection in 1972, the Administration announced major new impoundment actions affecting a variety of domestic programs. For example, a moratorium was imposed on subsidized housing programs, community development activities were suspended, and disaster assistance was reduced. Several farm programs were likewise targeted for elimination. Perhaps the most controversial of the Nixon impoundments involved the Clean Water Act funds. Court challenges eventually reached the Supreme Court, which in early 1975 decided the case on narrower grounds than the extent of the President's impoundment authority.⁵

Impoundment Control Act of 1974

During these impoundment conflicts of the Nixon years, Congress responded not only with ad hoc efforts to restore individual programs, but also with gradually more restrictive appropriations language. Arguably, the most authoritative response was the enactment of the Impoundment Control Act (ICA), Title X of the Congressional Budget and Impoundment Control Act of 1974.⁶ As a result of a compromise in conference, the ICA differentiated deferrals, or temporary delays in funding availability, from rescissions, or permanent cancellations of designated budget authority, with different procedures for congressional review and control of the two types of

⁴ For a history of presidential impoundment before 1974, see Louis Fisher, *Presidential Spending Power* (Princeton, NJ: Princeton University Press, 1975), pp. 147-201; and Ralph S. Abascal and John R. Kramer, "Presidential Impoundment Part I: Historical Genesis and Constitutional Framework," *Georgetown Law Journal*, vol. 62 (July 1974), pp. 1549-1618.

⁵ *Train v. City of New York*, 420 U.S. 35 (1975). For further discussion regarding the role of the courts in the impoundment disputes during the Nixon Administration, see James P. Pfiffner, *The President, the Budget, and Congress: Impoundment and the 1974 Budget Act* (Boulder, CO: Westview Press, 1979), pp. 77-108.

⁶ P.L. 93-344, 88 Stat. 332. The ICA became effective upon signing of the law on July 12, 1974. For further discussion of the impoundment conflicts and the legislative history of the 1974 law, see Allen Schick, *Congress and Money* (Washington, DC: The Urban Institute, 1980), pp. 17-81.

impoundment.⁷ The 1974 law also required the President to inform Congress of all proposed rescissions and deferrals and to submit specified information regarding each. The ICA further required the Comptroller General to oversee executive compliance with the law and to notify Congress if the President failed to report an impoundment or improperly classified an action.

The original language allowed a deferral to remain in effect for the period proposed by the President (not to exceed beyond the end of the fiscal year so as to become a de facto rescission) unless either the House or the Senate took action to disapprove it. Such a procedure, known as a one-house legislative veto, was found unconstitutional by the Supreme Court in *INS v. Chadha* (462 U.S. 919 (1983)). In May 1986 a federal district court ruled that the President's deferral authority under the ICA was inseverable from the one-house veto provision and hence was null; the lower court decision was affirmed on appeal in *City of New Haven v. United States* (809 F.2d 900 (D.C.C. 1987)).

In the case of a rescission, the ICA provided that the funds must be made available for obligation unless both houses of Congress take action to approve the rescission request within 45 days of "continuous session" (recesses of more than three days not counted). In practice, this usually means that funds proposed for rescission not approved by Congress must be made available for obligation after about 60 calendar days, although the period can extend to 75 days or longer. Congress may approve all or only a portion of the rescission request. Congress may also choose after the 45-day period to rescind funds previously requested for rescission by the President. Congress does rescind funds never proposed for rescission by the President, but such action is not subject to the ICA procedures.

The ICA establishes no procedures for congressional disapproval of a rescission request during the 45-day period. However, some administrations have voluntarily followed a policy of releasing funds before the expiration of the review period, if either the House or the Senate authoritatively indicates that it does not intend to approve the rescission.

In the fall of 1987, as a component of legislation to raise the limit on the public debt (P.L. 100-119), Congress enacted several budget process reforms. Section 207 prohibited the practice, sometimes used by Presidents when Congress failed to act on a rescission proposal within the allotted period, of submitting a new rescission proposal covering identical or very similar matter. By using such resubmissions, the President might continue to tie up funds even though Congress, by its inaction, had already rejected virtually the same proposal. The prohibition against such seriatim rescission proposals contained in the 1987 law applies for the duration of the appropriation, so that it may remain in effect for two or more fiscal years. Section 206 of P.L. 100-119 served to codify the decision in the *New Haven* case, allowing deferrals to provide for contingencies, to achieve savings made possible through changes in requirements or efficiency of operations, or as provided in statute. The ICA as amended no longer sanctions policy deferrals.⁸

⁷ According to one account, "Written by the staff members who put together the final version of budget reform, Title X was a novel combination of the House and Senate versions of the impoundment control bills." See Joel Havemann, *Congress and the Budget* (Bloomington, IN: Indiana University Press, 1978), pp. 178-179.

⁸ "Conference Report on House Joint Resolution 324," (H.Rept. 100-313), *Congressional Record*, vol. 133, Sept. 21, 1987, p. 24655.

Alternative to an Item Veto

The U.S. Constitution provides that the President may either sign a measure into law or veto it in its entirety. However, constitutions in 43 states provide for an item veto (usually confined to appropriation bills), allowing the Governor to eliminate discrete provisions in legislation presented for signature. Ten states allow the governor to reduce amounts as well as eliminate items, and seven States have an "amendatory" veto, permitting the governor to return legislation with specific suggestions for change.⁹

The first proposal to provide the President with an item veto was introduced in 1876. President Grant endorsed the mechanism, in response to the growing practice in Congress of attaching "riders," or provisions altering permanent law, to appropriations bills. Over the years many bills and resolutions (mainly proposed constitutional amendments) have been introduced, but action in Congress on item veto proposals, beyond an occasional hearing, has been limited. In 1938 the House approved an item veto amendment to the independent offices appropriations bill by voice vote, but the Senate rejected the amendment. Contemporary proposals for item veto are usually confined to bills containing spending authority, although not necessarily limited to items of appropriation.

In the 101st Congress, the Senate Judiciary Subcommittee on the Constitution held a hearing on proposed constitutional amendments permitting an item veto on April 11, 1989, and reported two such amendments, without recommendation, on June 8. S.J.Res. 14 would have allowed the President to veto only selected items in an appropriations bill, while S.J.Res. 23 would have authorized him to disapprove or reduce any item of appropriation, excluding legislative branch items. On April 26, 1990, the full Judiciary Committee voted 8-6 to report both measures favorably, but the report was not filed until September 19, 1990.¹⁰

In the 102nd Congress, the House voted on language providing item veto authority for the President. On June 11, 1992, during debate on H.J.Res. 290, proposing a constitutional amendment requiring a balanced budget, the House rejected by vote of 170-258 an amendment by Representative Kyl (H.Amdt. 602). The Kyl proposal sought to allow the President to exercise item veto authority in signing any measure containing spending authority (broadly defined), limit total outlays for a fiscal year to 19% of the gross national product of that year, and require a three-fifths vote of the Congress to approve any additional funds.¹¹

Some contended that the President already had item veto authority as a part of his constitutional powers. An article by Stephen Glazier, appearing in the *Wall Street Journal* on December 4, 1987, advocated this position. While a minority interpretation, this view claims some notable

⁹ See U.S. Congress, House Committee on Rules, *Item Veto: State Experience and its Application to the Federal Situation*, committee print, 99th Cong., 2nd sess., Dec. 1986 (Washington: GPO, 1986), pp. 47-49. Since that compilation was printed, the Maine Constitution has been amended to grant the governor item veto authority.

¹⁰ U.S. Congress, Senate Committee on the Judiciary, Subcommittee on the Constitution, *Line Item Veto*, hearing on S.J.Res. 14, S.J.Res. 23, and S.J.Res. 31, 101st Cong., 1st sess., Apr. 11, 1989 (Washington: GPO, 1991); and *Line-Item Veto*, report to accompany S.J.Res. 14 and S.J.Res. 23, 101st Cong., 1st sess., S.Rept. 101-466 (Washington: GPO, 1990).

¹¹ See CRS Report RL30223, *Presidential Rescission Authority: Efforts to Modify the 1974 Framework*, by Virginia A. McMurtry.

supporters.¹² The Senate Judiciary Committee's Subcommittee on the Constitution held a hearing on June 15, 1994, to receive testimony on the subject.

Some continue to believe that a statutory framework (different from the Line Item Veto Act of 1996) may yet be devised to give the President authority akin to an item veto without the necessity of a constitutional amendment. One statutory alternative entails bills incorporating the separate enrollment approach, which stipulate that each item of an appropriations bill be enrolled as a separate bill. Since 1985 such separate enrollment measures have been introduced repeatedly in the Senate. The Dole amendment to S. 4 in the 104th Congress, as passed by the Senate in March 1995 (S.Amdt. 347), incorporated the separate enrollment approach. In the 109th Congress, H.R. 4889 likewise reflects this approach.

Evolution of Expanded Rescission Proposals

Consideration of impoundment reform became increasingly joined with the idea of an item veto. During the Ford and Carter Administrations, the provisions of the ICA proved relatively noncontroversial. Dissatisfaction increased during the Reagan Administration. President Reagan, in his 1984 State of the Union message, specifically called for a constitutional amendment to grant item veto authority, which he considered to be a "powerful tool" while Governor of California. In his last two budget messages, President Reagan included enhanced rescission authority among his budget process reform proposals. President George H. W. Bush also endorsed the idea of expanded rescission authority and an item veto for the President. During the 1992 campaign, then-Governor Bill Clinton advocated a presidential item veto, and he subsequently endorsed enhanced rescission authority. During the 2000 campaign George W. Bush went on record in support of expanded rescission authority, and as President, he has repeatedly called for some kind of item veto authority.¹³

Instead of granting true item veto authority to the President via a constitutional amendment, efforts came to focus on modifying the framework for congressional review of rescissions by the President. Legislative activity directed toward granting the President expanded rescission authority extended over several years. Such statutory alternatives sometimes have been referred to as giving the President a "line item veto"; while the nomenclature is not technically correct, it does call attention to some functional similarities.

In examining impoundment reform legislation, the distinction often has been drawn between "enhanced" and "expedited" rescission proposals. With enhanced rescission, the intent is to reverse the "burden of action" and thereby create a presumption favoring the President. Such proposals usually stipulate that budget authority identified in a rescission message from the President is to be permanently canceled unless Congress acts to disapprove the request within a prescribed period. In contrast, the expedited rescission approach focuses on procedural changes in Congress to require an up or down vote on certain rescission requests from the President. Such measures contain expedited procedures to ensure prompt introduction of a measure to approve the rescission, fast report by committee or automatic discharge, special limits on floor amendments and debate, and so on. Under expedited rescission, congressional approval would still be

¹² This interpretation was explored at a symposium held in 1988. See *Pork Barrels and Principles: the Politics of the Presidential Veto*, by Charles J. Cooper et al. (Washington: National Legal Center, 1988).

¹³ For an examination of ICA rescission proposed by the respective Presidents, see CRS Report RL33869, *Rescission Actions Since 1974: Review and Assessment of the Record*, by Virginia A. McMurtry.

necessary to cancel the funding, but it would become difficult to ignore proposed rescissions and hence to reject them by inaction.

Some bills are “hybrids,” reflecting a combination of item veto and rescission language and sometimes features of both expedited and enhanced approaches to rescission reform as well. H.R. 2 in the 104th Congress (and ultimately, P.L. 104-130), represented such hybrids.

Toward the end of the 102nd Congress, H.R. 2164, characterized by its supporters as a compromise rescission reform measure agreeable to most sponsors of the other measures as well, had over 220 cosponsors. For the first time an expanded rescission measure received favorable floor action, when H.R. 2164 gained House approval on October 3, 1992, by vote of 312-97. The measure would have established procedures for expedited congressional consideration of certain rescission proposals from the President submitted not later than three days after signing an appropriations act. Under the measure, the proposed rescission could not reduce a program below the budget level of the previous year or by more than 25% for new programs. Funds would have become available after a vote in Congress to reject the proposed rescission.¹⁴

Consideration of expanded rescission bills resumed in the 103rd Congress. On two separate occasions, the House passed expedited rescission measures. Meanwhile, on March 25, 1993, the Senate adopted two sense of the Senate amendments relating to rescission reform as a part of the Budget Resolution for FY1994. The conference version retained a single sense of the Senate provision in this regard, stating the “President should be granted line-item veto authority over items of appropriations and tax expenditures” to expire at the end of the 103rd Congress. H.Con.Res. 218, the Budget Resolution for FY1995, as adopted in May 1994, also contained sense-of-the-House provisions regarding enactment of certain budget process legislation, including expedited rescission authority for the President.¹⁵

Enactment of the Line Item Veto Act of 1996

Action on an expanded rescission measure commenced early in the 104th Congress. This reflected the results of the November midterm elections, which returned a Republican majority to both the House and Senate. On September 28, 1994, many House Republican Members and candidates signed the *Republican Contract with America*, which pledged action on a number of measures, including a “legislative line item veto,” within the first 100 days, should a Republican majority be elected.

Hearings began on January 12, 1995, when the Senate Committee on Governmental Affairs and the House Committee on Government Reform and Oversight held a joint hearing on H.R. 2, to give the President legislative line item veto authority. On January 18, the Senate Budget Committee held a hearing on related measures (S. 4, S. 14, and S. 206). The Senate Judiciary Subcommittee on the Constitution held a hearing on January 24 to consider constitutional amendment proposals. On January 25, the House Committee on Government Reform and

¹⁴ CRS Report RL30223, *Presidential Rescission Authority: Efforts to Modify the 1974 Framework*, by Virginia A. McMurtry, p. 8.

¹⁵ *Ibid.*, pp. 9-10.

Oversight ordered H.R. 2 reported, as amended, and the next day the House Rules Committee likewise reported a further amended version of H.R. 2.¹⁶

House floor consideration of H.R. 2 commenced on February 2, 1995, on the version of H.R. 2 reported as an amendment in the nature of a substitute, with an open rule and over 30 amendments pending. The House debated the measure for three days during which time six amendments were approved and 11 amendments were rejected, along with a motion to recommit with instructions. On February 6, 1995, the House passed H.R. 2, as amended, by vote of 294-134. The date of passage had special meaning, as it was the 84th birthday of former President Ronald Reagan, long a supporter of an item veto for the President.

On February 14, 1995, the Senate Budget Committee held markup on pending rescission measures. The committee ordered S. 4, as amended, reported without recommendation, by vote of 12-10. S. 14 was also ordered reported without recommendation, with an amendment in the nature of a substitute further amended, by vote of 13-8.¹⁷ The committee failed to order reported proposed legislation to create a legislative item veto by requiring separate enrollment of items in appropriations bills and targeted tax benefits in revenue bills.

On February 23, 1995, the Senate Governmental Affairs Committee held a hearing on S. 4 and S. 14. There had been a joint hearing with the House Government Reform and Oversight Committee on January 12, but some Senators on the committee, including the ranking minority member, maintained that the additional hearing day was needed because they had been unable to attend in January, due to competing duties that day on the Senate floor. On March 2, 1995, the Governmental Affairs Committee held markup, with similar results as occurred in the Budget Committee: both bills were ordered reported without recommendation.¹⁸ S. 4 was ordered reported by voice vote; previously the Stevens amendment to the Glenn motion to report carried by vote of 9-6. During markup of S. 14, the Pryor amendment to exempt budget authority for the operations of the Social Security Administration from expedited rescission was adopted by voice vote. S. 14 was then ordered reported by vote of 13-2.

In the Senate, general debate on the subject of item veto began on March 16; it continued on March 17 and on March 20 until late in the afternoon, when floor consideration of S. 4 began. The Republican leaders in the Senate reportedly delayed consideration of legislative line item veto bills in hopes of developing a compromise measure that supporters of S. 4 and S. 14 could all embrace. The "Republican compromise" substitute appeared as Dole Amendment No. 347 on March 20; this substitute amendment incorporated the separate enrollment approach, which seeks to confer item veto authority by statutory means. During consideration of S. 4 on March 20, two perfecting amendments added by the Budget Committee were withdrawn; the provisions so

¹⁶ U.S. Congress, House Committee on Government Reform and Oversight, *Line Item Veto Act*, report to accompany H.R. 2, 104th Cong., 1st sess., H.Rept. 104-11, part 2 (Washington: GPO, 1995); and House Committee on Rules, *Line Item Veto Act*, report to accompany H.R. 2, 104th Cong., 1st sess., H.Rept. 104-11, part 1 (Washington: GPO, 1995).

¹⁷ U.S. Senate, Committee on the Budget, *Legislative Line Item Veto Act of 1995*, report to accompany S. 4, 104th Cong., 1st sess., S.Rept. 104-9 (Washington: GPO, 1995); and Senate Committee on the Budget, *Legislative Line Item Veto Act of 1995*, report to accompany S. 14, 104th Cong., 1st sess., S.Rept. 104-10 (Washington: GPO, 1995).

¹⁸ U.S. Congress, Senate Committee on Governmental Affairs, *Legislative Line Item Veto Act of 1995*, report to accompany S. 4, 104th Cong., 1st sess., S.Rept. 104-13 (Washington: GPO, 1995); and Senate Committee on Governmental Affairs, *Legislative Line Item Veto Act of 1995*, report to accompany S. 14, 104th Cong., 1st sess., S.Rept. 104-14 (Washington: GPO, 1995).

deleted related to procedures for deficit reduction and to a sunset date for the enhanced rescission authority (both are still found in S. 14).

Floor debate on S. 4 continued on March 21-23. Eight amendments were adopted by voice vote, including the Dole Amendment itself, providing for separate enrollment for presentation to the President of each item of any appropriation and authorization bill or resolution providing direct spending or targeted tax benefits. The Senate ultimately passed S. 4, with the Dole Amendment in the nature of a substitute and additional amendments, on March 23, 1995, by vote of 69-29.

The significant differences between the House-passed H.R. 2 (enhanced rescission approach), and the Senate-passed S. 4 (separate enrollment approach), needed to be resolved in conference. On May 17, 1995, the House passed S. 4, after agreeing to strike all after the enacting clause of Senate-passed S. 4 and insert in lieu the language of the House-passed H.R. 2. The Senate agreed to a conference and named eighteen conferees on June 20. On August 1, the Senate approved (83-14) a Dorgan Amendment to H.R. 1905, FY1996 Energy and Water Appropriations, to express the sense of the Senate that the House Speaker should move immediately to appoint conferees on S. 4. On September 7, 1995, the Speaker appointed eight House conferees, after a motion to instruct conferees to make the bill applicable to current and subsequent fiscal year appropriation measures was agreed to by voice vote.

The conference committee held an initial meeting on September 27, 1995, at which opening statements were presented, and Representative Clinger was chosen as conference chairman. The Members present then instructed staff to explore alternatives for reconciling the two versions. On October 25, 1995, the House agreed to a motion to instruct the House conferees on S. 4 to insist upon the inclusion of provisions to require that the bill apply to the targeted tax benefit provisions of any revenue or reconciliation bill enacted into law during or after FY1995, by vote of 381-44. The conferees met again on November 8, 1996, at which time the House Republicans on the committee offered a compromise package. Some key elements included accepting the House approach of enhanced rescission, using the Senate definition of "item" for possible veto, using compromise language approved by the Joint Committee on Taxation for defining "targeted tax benefits," including new direct spending, accepting Senate "lockbox" language (designed to ensure that any savings from cancellations could be used only for deficit reduction), and dropping the Senate sunset proposal.

In his State of the Union message on January 23, 1996, President Clinton urged Congress to complete action on a line item veto measure, stating "I also appeal to Congress to pass the line item veto you promised the American people,"¹⁹ but negotiations apparently remained stalled. Following return from the congressional recess in February, the pace of conference activity appeared to pick up considerably. On March 14, 1996, Republican negotiators on the conference committee reported that they had reached agreement on a compromise version of S. 4, and the conference report was filed on March 21, 1996.²⁰ Although there was no public conference meeting for approval, the Republican negotiators obtained the signatures of a majority of conferees, thus readying the conference report for final action.

¹⁹ U.S. President (Clinton), "Address Before Joint Session of Congress on the State of the Union," Jan. 23, 1996, *Public Papers of the Presidents*, 1996, vol. 1 (Washington: GPO, 1997), p. 85.

²⁰ U.S. Congress, Conference Committees, *Line Item Veto Act*, conference report to accompany S. 4, 104th Cong., 1st sess., H.Rept. 104-491 (Washington: GPO, 1996).

The conference substitute reflected compromise between the House and Senate versions, although the enhanced rescission approach of H.R. 2 rather than the separate enrollment framework of S. 4 was chosen. As in the November compromise package, new direct spending and certain targeted tax benefits were subject to the new authority of the President as well as items of discretionary spending in appropriation laws. The measure was to take effect on January 1, 1997, absent an earlier balanced budget agreement, and would terminate on January 1, 2005. The Senate approved the conference substitute on March 27, 1996, by vote of 69-31, and the House followed suit on March 28, 1996, by vote of 232-177. President Clinton signed S. 4 on April 9, 1996.²¹

The Line Item Veto Act of 1996 (LIVA) amended the Congressional Budget and Impoundment Control Act of 1974 (P.L. 93-344), to give the President “enhanced rescission authority” to cancel certain items in appropriations and entitlement measures and also certain narrowly applicable tax breaks. The act authorized the President to cancel in whole any dollar amount of discretionary budget authority (appropriations), any item of new direct spending (entitlement), or limited tax benefits with specified characteristics, contained in a bill otherwise signed into law. The cancellation was to take effect upon receipt in the House and Senate of a special notification message. “Cancellation” in this context meant to prevent from having legal force; in other words, provisions canceled never were to become effective unless Congress reversed the action of the President by enacting a “disapproval bill.” The President was only to exercise the cancellation authority if he determined that such cancellation would reduce the federal budget deficit and would not impair essential government functions or harm the national interest; and then notified the Congress in a special message of any such cancellation within 5 calendar days after enactment of the law providing such amount, item, or benefit. The act provided 30 days for the expedited congressional consideration of disapproval bills to reverse the cancellations contained in the special messages received from the President. Detailed provisions for expedited consideration of the disapproval bill in the House and Senate were outlined.²² The LIVA also contained a “lockbox” procedure to help ensure that any savings from cancellations go toward deficit reduction. This was to be accomplished by binding the new procedures to existing requirements relating to discretionary spending limits and the PAYGO requirements of the Budget Enforcement Act of 1990. To facilitate judicial review, the act provided for (1) expedited review by the U.S. District Court for the District of Columbia of an action brought by a Member of Congress or an adversely affected individual on the ground that any provision of this act violates the Constitution; (2) review of an order of such Court by appeal directly to the Supreme Court; and (3) expedited disposition of such matter by the Supreme Court. The act became effective on January 1, 1997.

Developments During the 105th Congress

During 1997, the first year with the Line Item Veto Act in effect, several noteworthy developments involved judicial challenges and the first use of the new authority by President Clinton. In Congress, disapproval bills to overturn the cancellations by the President were introduced, along with alternative measures for providing the President with expanded rescission authority, bills to repeal the Line Item Veto Act, and even a bill to correct an apparent “loophole”

²¹ P.L. 104-130, 110 Stat. 1200.

²² U.S. Congress, House Committee on Rules, *The Use and Application of the Line Item Veto Act*, committee print, 104th Cong., 2nd sess. (Washington: GPO, 1997).

in the original Act. In 1998, there were additional court challenges, with the Supreme Court eventually striking down the new law as unconstitutional.

Initial Court Decisions

On April 9, 1996 (the same day the Line Item Veto Act was signed by President Clinton), the National Treasury Employees Union et al. filed a complaint for declaratory and injunctive relief, challenging the constitutionality of the new law in the U.S. District Court for the District of Columbia (Civil Action No. 96-624). Only individuals "adversely affected" by the expanded presidential authority, or Members of Congress, can bring action under the "expedited judicial review" provision in the law. On July 3, 1996, a federal judge dismissed the case, ruling that the union's claims were "too speculative and remote" to provide legal standing under the law.²³

On January 2, 1997, the day after the Line Item Veto Act went into effect, another suit challenging its constitutionality was filed in the same court (referred to as *Byrd v. Raines*). The plaintiffs, led by Senator Robert Byrd, now included six Members of Congress: Senators Byrd, Mark Hatfield, Daniel Moynihan, and Carl Levin, and Representatives David Skaggs and Henry Waxman. Office of Management and Budget Director Franklin Raines and Secretary of the Treasury Robert Rubin were named as defendants, because of their responsibilities for implementing key aspects of the law. The plaintiffs contended that the act violated the constitutional requirements of bicameral passage and presentment "by granting to the President, acting alone, the authority to 'cancel' and thus repeal provisions of federal law."

On January 22, 1997, the Senate by unanimous consent agreed to S.Res. 21 to direct the Senate Legal Counsel to appear as *amicus curiae* (friend of the court) in the name of the Senate in the *Byrd v. Raines* case. During debate on S.Res. 21, Majority Leader Trent Lott noted that Title VII of the Ethics in Government Act authorized such action by the Senate in any legal action "in which the powers and responsibilities of the Congress under the Constitution are placed in issue."

On March 21, 1997, U.S. District Court Judge Thomas Penfield Jackson heard oral arguments in the case of *Byrd v. Raines*. Less than three weeks later, on April 10, Judge Jackson ruled that the Line Item Veto Act was unconstitutional because it violated provisions of the Presentment Clause in the Constitution (Article I, Section 7, Cl. 2). His ruling found that compared with permissible delegations in the past, the Line Item Veto Act, "hands off to the President authority over fundamental legislative choices." In so doing, "Congress has turned the constitutional division of responsibilities for legislating on its head."²⁴

As already noted, the Line Item Veto Act provided for expedited judicial review, allowing for appeal of a district court decision directly to the Supreme Court. Such a request was filed, and on April 23, 1997, the Supreme Court agreed to an accelerated hearing. The Court heard oral arguments on May 27 and announced its decision in *Raines v. Byrd* on June 26, 1997. In a 7-2 decision, the Court held that the Members of Congress challenging the law lacked legal standing, so the judgment of the lower court (finding the act unconstitutional) was put aside and the Line Item Veto Act remained in force. However, the Supreme Court confined its decision to the

²³ *NTEU v. United States*, 929 F.Supp. 484, 488 (D.D.C. 1996).

²⁴ *Byrd v. Raines*, 956 F.Supp. 25, 37-38 (D.D.C. 1997).

technical issue of jurisdiction and refrained from considering the underlying merits of the case (i.e., whether the Line Item Veto Act was unconstitutional).²⁵

The Line Item Veto in Action

On August 11, 1997, President Clinton exercised his new veto authority for the first time by transmitting two special messages to Congress, reporting his cancellation of two limited tax benefit provisions in the Taxpayer Relief Act of 1997 (P.L. 105-34), and one item of direct spending in the Balanced Budget Act of 1997 (P.L. 105-33).²⁶ Both measures had been signed into law on August 5, 1997. The law provided a period of 30 calendar days of session after receipt of a special message (only days when both the House and Senate are in session count) for Congress to consider a disapproval bill under expedited procedures.

Upon reconvening in early September, Congress responded quickly to the President's cancellations, with the introduction of four disapproval bills. S. 1144 and H.R. 2436 sought to disapprove the cancellation of the direct spending provision in P.L. 105-33, transmitted by the President on August 11, 1997, and numbered 97-3, regarding Medicaid funding in New York. S. 1157 and H.R. 2444 sought to disapprove the cancellations of two limited tax benefit provisions in P.L. 105-34, transmitted by the President on August 11, 1997, and numbered 97-1 and 97-2. The first provision dealt with income sheltering in foreign countries by financial services companies, and the second involved tax deferrals on gains from the sales of agricultural processing facilities to farmer cooperatives. A compromise was apparently reached between the White House and congressional leaders on the canceled tax benefit provisions; on November 8, 1997, the disapproval bill (H.R. 2444) was tabled in the House, and no further action occurred on S. 1157.

On October 6, 1997, President Clinton exercised the new authority to veto items in appropriations bills by cancelling 38 projects contained in the FY1998 Military Construction Appropriations Act (P.L. 105-45). On October 24, the Senate Appropriations Committee approved S. 1292, with an amendment to exclude two more of the projects from the disapproval bill, reflecting the wishes of Senators from the states involved; there was no written report. On October 30, the Senate passed S. 1292, after the committee amendment was withdrawn, disapproving 36 of the 38 cancellations, by vote of 69-30. On November 8, 1997, the House passed its version of the disapproval bill, H.R. 2631 (covering all 38 of the cancellations originally in the President's message), by vote of 352-64. On November 9, the Senate passed H.R. 2631 by unanimous consent, precluding the need for conference action, and clearing the disapproval measure for the President. On November 13, 1997, the President vetoed H.R. 2631, the first disapproval bill to reach his desk under the provisions of the 1996 law. The House voted to override on February 5, 1998 (347-69), and the Senate did likewise on February 25, 1998 (78-20); therefore, the disapproval bill was enacted over the President's veto (P.L. 105-159). (Cancellations under the Line Item Veto Act became

²⁵ *Raines v. Byrd*, 521 U.S. 811 (1997).

²⁶ The cancellation messages were published in the *Federal Register* and also as congressional documents. See Office of Management and Budget "Cancellation Pursuant to the Line Item Veto Act: Taxpayer Relief Act of 1997," *Federal Register*, vol. 62, no. 155, Aug. 12, 1997, p. 43265; and Message from the President transmitting "A Cancellation of Two Limited Tax Benefits Contained in the Taxpayer Relief Act of 1997, pursuant to P.L. 104-130 Sec. 2(a)," 105th Cong., 1st sess., H.Doc. 105-116 (Washington: GPO, 1997). The Office of the Federal Register, Archives and Records Administration assembled and continues to sponsor a site with the "History of Line Item Veto Notices," providing links to all 82 of the cancellation notices as they appeared in the *Federal Register*, along with other relevant information, available electronically at <http://www.access.gpo.gov/nara/nara004.html>.

effective on the date the special message from the President was received by the House and Senate, but the cancellations became null and void if a disapproval bill was enacted.)

On October 14, 1997, President Clinton vetoed 13 projects in the Department of Defense Appropriations. On October 16, 1997, he used the cancellation authority on a provision in the Treasury and General Government Appropriations relating to pension systems for federal employees. On October 17, 1997, the President applied his veto to eight more projects, this time in the Energy and Water Appropriations Act. On November 1, 1997, President Clinton exercised his line-item veto authority in two appropriations acts, canceling seven projects in the VA/HUD measure and three projects in the Transportation Act. On November 20, 1997, the President canceled two projects from Interior and five from the Agriculture Appropriations Act. On December 2, 1997, President Clinton exercised his line-item veto authority for a final time in one of the 13 annual appropriations acts for FY1998, canceling a project in the Commerce-Justice-State measure. This action brought the total of special messages in 1997 to 11, and the total cancellations under the new law to 82²⁷.

More Court Challenges

Once the President used the new authority, other cases were expected to be brought by parties who could more easily establish standing, having suffered ill effects directly as a result of the cancellations. On October 16, 1997, two separate cases challenging the Line Item Veto Act were initiated. A complaint was filed by the City of New York and other interested parties seeking to overturn the cancellation of the new direct spending provision affecting Medicaid funding in the Balanced Budget Act in the U.S. District Court for the District of Columbia (case number 1:97CV02393). On the same day, the National Treasury Employees Union (who had brought the first suit challenging the new law in the spring of 1996, even before it became effective), filed another suit in district court, seeking to overturn the veto of the federal pension provision in the Treasury Appropriations Act (case number 1:97CV02399). On October 21, 1997, a third case, seeking to overturn the cancellation of the limited tax benefit affecting farm cooperatives, was filed in the district court by Snake River Potato Growers, Inc. (case number 1:97CV02463). On October 24, 1997, the cases of the three suits challenging the Line Item Veto Act, were combined, placed in the random assignment pool, and ultimately reassigned to Judge Thomas Hogan. On October 28, 1997, NTEU filed an amended complaint, challenging the specific application of the cancellation authority (as well as the constitutionality of the law). A hearing on the consolidated case was set for January 14, 1998.

Meanwhile, on December 19, 1997, the Clinton Administration conceded that the President's cancellation in October of the federal pension provision exceeded the authority conveyed in the Line Item Veto Act. On January 6, 1998, Judge Hogan approved a negotiated settlement in the suit between the Justice Department and the National Treasury Employees Union and ordered that the previously canceled pension provision for an open season to switch pension plans be reinstated. The order found that the President lacked authority to make this cancellation, and so it was "invalid and without legal force and effect." The NTEU's constitutional challenge was declared moot, but oral arguments for the two remaining parties in the consolidated case challenging the law's constitutionality were to proceed.

²⁷ Enactment of P.L. 105-159, already noted, served to disapprove 38 cancellations in the Military Construction Appropriations Act, and another cancellation was found impermissible under the law (discussed below). So 43 of the original 82 cancellations were in force when the Supreme Court overturned the Line Item Veto Act in 1998.

On January 14, 1998, there was a three-hour hearing before Judge Hogan. Arguments were presented by attorneys for the Idaho potato farmers group and for New York City and co-plaintiffs in the cases involving cancellations by the President in August, 1997, of a limited tax benefit provision and an item of new direct spending (affecting Medicaid funding). Judge Hogan on February 12, 1998, issued his ruling, which held the Line Item Veto Act unconstitutional, because it "violates the procedural requirements ordained in Article I of the United States Constitution and impermissibly upsets the balance of powers so carefully prescribed by its Framers."²⁸ On February 20, 1998, the Justice Department appealed that decision to the Supreme Court, and on February 27, 1998, the Supreme Court agreed to review the case.

The Supreme Court heard oral arguments in the case of *Clinton v. New York City* on April 27, 1998. Both sides conceded that a true item veto, allowing the President to sign some provisions and veto others when presented a piece of legislation, would be unconstitutional. The Solicitor General sought to distinguish the President's cancellation of provisions under the Line Item Veto Act from a formal repeal of the provisions, but several of the Justices seemed skeptical. Another key argument concerned the matter of delegation and whether the act conveys so much authority to the President as to violate the separation of powers. The issue of standing for the two groups of plaintiffs combined in the case also was examined. On June 25, 1998, the Court rendered its decision, holding the Line Item Veto Act unconstitutional, because its cancellation provisions were in violation of procedures set forth in the Constitution's presentment clause found in Article I, section 7.²⁹

In the immediate aftermath of the Supreme Court decision there was some uncertainty regarding how funding for projects canceled under the now unconstitutional law could be restored. In the view of some, OMB might not be required to fund projects eliminated from appropriations acts, because the cancellations in the consolidated case brought before the Supreme Court only involved limited tax benefit and direct spending provisions. Some suggested that each affected party might have to sue, as did New York City in the case decided by the Supreme Court. Although it was widely expected that funding for projects not explicitly covered by the Supreme Court decision would be restored, three weeks passed before the Justice Department and OMB determined officially that the funds were to be released. On July 17, 1998, OMB announced that funds for the remaining cancellations (those not overturned by previous litigation or the disapproval bill covering the Military Construction appropriations) would be made available.

Consideration of Alternatives to the Line Item Veto Act

After the President exercised the new authority to cancel items in appropriations acts, bills were introduced to repeal the Line Item Veto Act. On October 9, 1997, such a bill was introduced by Representative Skaggs (H.R. 2650, 105th Congress), and on October 24, 1997, a similar bill was introduced by Senators Byrd and Moynihan (S. 1319, 105th Congress).

Shortly after the district court decision in April 1997, expanded rescission measures were reintroduced in the 105th Congress. On April 15, 1997, H.R. 1321, an expedited rescission measure similar to that passed by the House in the 103rd Congress, was introduced, and on the following day, S. 592, a separate enrollment measure identical to S. 4 as passed by the Senate in

²⁸ *City of New York v. Clinton*, and *Snake River Potato Growers, Inc. v. Rubin*, 985 F.Supp. 168 (D.D.C. 1998).

²⁹ *Clinton v. City of New York*, 524 U.S. 417 (1998). The decision is available online at <http://supct.law.cornell.edu/supct/html/97-1374.ZS.html>.

the 104th Congress, was introduced. Joint resolutions proposing an item veto constitutional amendment were also introduced. Another bill introduced in the fall of 1997, H.R. 2649, combined the features of H.R. 2650 (repealing the line-item veto) and H.R. 1321 (establishing a framework for expedited rescission).

On March 11, 1998, the House Rules Subcommittee on Legislative and Budget Process began two days of hearings on the Line Item Veto Act. Although the principal focus of the hearing was on the operation of the act during its first year, there was some consideration of possible alternatives should the law be found unconstitutional by the Supreme Court.

On June 25, 1998, the same day the Supreme Court held the Line Item Veto Act unconstitutional, three more bills were introduced. Two new versions of expedited rescission (similar but not identical measures), seeking to apply expedited procedures to targeted tax benefits as well as to rescissions of funding in appropriations measures, were introduced as H.R. 4174 and S. 2220 (105th Congress). A modified version of separate enrollment, applicable to authorizing legislation containing new direct spending, as well as to appropriations measures, was introduced as S. 2221.

Developments from 1999-2004

106th Congress

Upon convening of the 106th Congress in January 1999, measures were again introduced to propose constitutional amendments giving the President line-item veto authority (H.J.Res. 9, H.J.Res. 20, H.J.Res. 30, and S.J.Res. 31), and to provide alternative statutory means for conveying expanded impoundment authority to the President (S. 100 and S. 139). Subsequently, two expedited rescission bills were introduced in the House (H.R. 3442 and H.R. 3523).

On July 30, 1999, the House Rules Subcommittee on the Legislative and Budget Process held a hearing to address the subject, "The Rescissions Process after the Line Item Veto: Tools for Controlling Spending." Testimony was received from the Office of Management and Budget, the Congressional Budget Office, and the General Accounting Office, as well as from a panel of academic experts.

On March 23, 2000, the House Judiciary Subcommittee on the Constitution held a hearing to consider measures proposing a constitutional amendment for an item veto. Two Members testified in support of H.J.Res. 9. A second panel, consisting of seven outside witnesses, provided various viewpoints. During the presidential election campaign in 2000, the topic of expanded rescission authority for the President received some attention, with both candidates on record in support of such legislation.

107th Congress

In his budget message transmitted to Congress on February 28, 2001, President George W. Bush endorsed several budget process reforms, including a call to "restore the President's line item veto authority." In the subsequent discussion, the document suggested that the constitutional flaw in the Line Item Veto Act of 1996 might be corrected by linking the line-item veto to retiring the

national debt.³⁰ On April 9, 2001, President Bush transmitted to Congress a more detailed budget for FY2002, without further mention of the line-item veto proposal.

In his budget submission for FY2003, sent to Congress on February 4, 2002, President Bush again endorsed various proposals for reform of the budget process, including another try at crafting a line-item veto that could pass constitutional muster. As described therein, the President's proposal would restore authority exercised by Presidents prior to 1974 (and the restrictions imposed by the ICA). Specifically, the proposal "would give the President the authority to decline to spend new appropriations, to decline to approve new mandatory spending, or to decline to grant new limited tax benefits (to 100 or fewer beneficiaries) whenever the President determines the spending or tax benefits are not essential Government functions, and will not harm the national interest."³¹

In the 107th Congress, two measures proposing an item veto constitutional amendment were introduced. H.J.Res. 23 sought to allow the President to disapprove any item of appropriation in any bill. H.J.Res. 24 sought to allow the President to decline to approve (i.e., to item veto) any entire dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit. On March 28, 2001, during House consideration of H.Con.Res. 83 (FY2002 budget resolution), a substitute endorsed by Blue Dog Coalition³² was offered, which contained a sense of the Congress provision calling for modified line-item veto authority to require Congressional votes on rescissions submitted by the President; the amendment was rejected 204-221.

On October 9, 2002, the Congressional Budget Office estimated a total federal budget deficit of about \$157 billion for FY2002, reflecting the largest percentage drop in revenues in over 50 years and the largest percentage growth in spending on programs and activities in 20 years. Some hoped that the worsening deficit picture might stimulate renewed interest in mechanisms thought conducive to spending control, such as a line-item veto or expanded impoundment authority for the President.

108th Congress

In his budget submission for FY2004, President Bush repeated his request for legislation to provide him with a "constitutional line-item veto" to use on "special interest spending items." While discussion the previous year had called for applying savings to debt reduction, the explanation now suggested that all savings from the line-item veto would be designated for deficit reduction.³³

³⁰ U.S. Office of Management and Budget, *A Blueprint for New Beginnings: A Responsible Budget for America's Priorities* (Washington: GPO, 2001), pp. 175-176.

³¹ U.S. Office of Management and Budget, *Fiscal Year 2003 Analytical Perspectives* (Washington: GPO, 2002), pp. 217-218.

³² The Blue Dog Coalition was organized in the 104th Congress as a policy-oriented group of moderate and conservative Democrats. In the 109th Congress, its 37 members are geographically diverse, but the group's nickname reflects some southern ancestry. "Taken from the South's longtime description of a party loyalist as one who would vote for a yellow dog if it were on the ballot as a Democrat, the 'Blue Dog' moniker was taken by members of the coalition because their moderate-to-conservative views had been 'choked blue' by their party in the years leading up to the 1994 election." See the group's website at <http://www.bluedogdems.com/what.html>.

³³ U.S. Office of Management and Budget, *Fiscal Year 2004 Analytical Perspectives* (Washington: GPO, 2003), p. 318.

Early in the 108th Congress, H.R. 180, an omnibus budget reform measure, was introduced, containing provisions for expedited procedures for congressional action on proposals from the President to rescind budget authority identified as “wasteful spending” (Section 252). On April 11, 2003, during remarks on a forthcoming supplemental appropriations conference report, the ranking member of the Appropriations Committee offered his observations on the demise of the Line Item Veto Act of 1996.³⁴ On June 16, 2003, H.J.Res. 60, proposing a constitutional amendment to authorize the line-item veto, was introduced by Representative Andrews. On November 19, 2003, S.J.Res. 25, proposing a constitutional amendment and reading, in part, “Congress shall have the power to enact a line-item veto,” was introduced by Senator Dole.

In his budget submission for FY2005, transmitted February 2, 2004, President Bush again called for legislation to provide him with a “constitutional line-item veto” linked to deficit reduction. According to the explanation provided, such a device is needed to deal with spending or tax provisions benefitting “a relative few which would not likely become law if not attached to other bills.” The line-item veto envisioned would give the President authority “to reject new appropriations, new mandatory spending, or limited grants of tax benefits (to 100 or fewer beneficiaries) whenever the President determines the spending or tax benefits are not essential Government priorities.” All savings resulting from the exercise of such vetoes would go to reducing the deficit.³⁵

In the second session of the 108th Congress, additional budget reform measures were introduced with provisions that would have granted expedited rescission authority to the President. The budget resolution for FY2005 (S.Con.Res. 95), as approved by the Senate on March 11, 2004, contained several Sense of the Senate provisions in Title V, Section 501, relating to budget process reform, called for enactment of legislation to restrain government spending, including such possible mechanisms as enhanced rescission or constitutional line-item veto authority for the President.

A bill in the 108th Congress, H.R. 3800, the Family Budget Protection Act of 2004, contained expedited rescission provisions in Section 311; and H.R. 3925, the Deficit Control Act of 2004, included such provisions in Section 301. On June 16, 2004, an editorial in the *Wall Street Journal* endorsed H.R. 3800, offering special praise for its expedited rescission provisions: “Presidents would have the power of rescission on line items deemed wasteful, which would then be sent back to Congress for an expedited override vote.” Further, the editorial stated, the procedures would preserve Congress’s power of the purse, and might also provide “a deterrent effect on the porkers.”³⁶ On June 24, 2004, provisions from H.R. 3800 were offered as a series of floor amendments during House consideration of H.R. 4663, the Spending Control Act of 2004. An amendment that sought to initiate expedited rescission for the President to propose the elimination of wasteful spending identified in appropriations bills was rejected by a recorded vote of 174-237.

On August 3, 2004, the Kerry-Edwards [Democratic Party] plan “to keep spending in check while investing in priorities and cutting wasteful spending” was released. Included in the presidential campaign document was a proposal for expedited rescission authority, whereby the President

³⁴ Sen. Robert Byrd, “A Constitutional Emergency Response Fund,” *Congressional Record*, daily edition, vol. 149, Apr. 12, 2003, p. S5398.

³⁵ U.S. Office of Management and Budget, *Fiscal Year 2005 Analytical Perspectives* (Washington: GPO, 2004), p. 285.

³⁶ See “GOP Budget Revolt,” *Wall Street Journal*, June 16, 2004, pp. A12, A14.

could sign a bill and then send back to Congress a list of specific spending items and tax expenditures of which he disapproved, for an expedited, up-or-down vote.

President Bush reiterated his support for restoring presidential line item veto authority in his speech to the Republican national convention on September 2, 2004. At his first post-election news conference, on November 4, 2004, in response to a question about reducing the deficit, he stated, in part, that the president needed a line item that “passed constitutional muster,” in order “to maintain budget discipline.” At a press conference on December 20, 2004, the President again called for line item veto authority, responding that he had not yet vetoed any appropriations bills, because Congress had followed up on his requested budget targets; but further observing, “Now I think the president ought to have the line item veto because within the appropriations bills there may be differences of opinion [between the executive branch and Congress] on how the money is spent.”³⁷

Developments in the 109th Congress

On January 31, 2006, in his State of the Union address, President Bush reiterated his request for line-item veto authority, noting: “And we can tackle this problem [of too many special-interest “earmark” projects] together, if you pass the line-item veto.”³⁸ In his budget submission for FY2006, transmitted February 7, 2005, President Bush called for a “line item veto linked to deficit reduction.”

On March 6, 2006, President Bush sent a draft bill titled the Legislative Line Item Veto Act of 2006 to Congress,³⁹ and the measure was introduced the next day (see H.R. 4890 and S. 2381 below). Title notwithstanding, the bills sought to amend the Impoundment Control Act of 1974 (ICA) to incorporate a typical expedited rescission framework, intended through procedural provisions to require an up-or-down vote on presidential requests to cancel certain previously enacted spending or tax provisions. Since congressional approval would remain necessary for the rescissions to become permanent, expedited rescission is generally viewed as a weaker tool than an item veto. H.R. 4890 and S. 2381, as introduced, also contained rather novel provisions authorizing the President to withhold funds proposed for rescission or to suspend execution of items of direct spending for up to 180 days. These provisions arguably might sanction the return of policy deferrals, originally provided for in the ICA, subject to a one-house veto, but invalidated by the *Chadha* and *New Haven* decisions, as well as the statutory provisions in P.L. 100-119.⁴⁰

On March 15, 2006, the House Rules Subcommittee on the Legislative and Budget Process held a hearing on H.R. 4890. Testimony was received from Representative Paul Ryan, sponsor of H.R. 4890, and from Representative Jerry Lewis, chairman of the House Appropriations Committee. The Deputy Director of OMB and the Acting Director of CBO also appeared before the

³⁷ Press Conference of President George W. Bush, Dec. 20, 2004. Available electronically at <http://www.whitehouse.gov/news/releases/2004/12/20041220-3.html>.

³⁸ U.S. President (George W. Bush), “Address before a Joint Session of the Congress on the State of the Union,” *Weekly Compilation of Presidential Documents*, vol. 42, Feb. 6, 2006, p. 145.

³⁹ President’s message, along with press briefing and fact sheet available electronically at <http://www.whitehouse.gov/news/releases/2006/03/20060306-5.html>.

⁴⁰ See above, p. 4. For a discussion of possible constitutional issues in measures in the 109th Congress, see CRS Report RL33365, *Line Item Veto: A Constitutional Analysis of Recent Proposals*, by Morton Rosenberg.

subcommittee.⁴¹ On April 27, 2006, the House Judiciary Subcommittee on the Constitution held a hearing on the line item veto and received testimony from Representatives Paul Ryan and Mark Kennedy; and from two attorneys, Charles J. Cooper in private practice, and Cristina Martin Firvida of the National Women's Law Center. On May 2, the Senate Budget Committee held a hearing on S. 2381; witnesses included Senator Robert Byrd, Austin Smythe from OMB, Donald Marron from CBO, Louis Fisher from the Library of Congress, and attorney Charles J. Cooper.

The House Budget Committee held two hearings on H.R. 4890, on May 25 and June 8, 2006. The first day focused on "Line-Item Veto: Perspectives on Applications and Effects" and featured four witnesses representing private sector groups, including a former Member and two former congressional aides. The second hearing concentrated on constitutional issues, with testimony received from Charles Cooper, Louis Fisher, and Professor Viet D. Dinh from the Georgetown University Law Center.⁴²

On June 14, the House Budget Committee held markup of H.R. 4890. Representative Paul Ryan offered a substitute amendment, which was further amended. An amendment offered by Representative Cuellar to add a sunset provision, whereby the act would expire after six years, was approved by voice vote. Also successful was an amendment offered by Representative Neal, as further amended by Representative McCotter, expressing the sense of Congress regarding possible abuse of proposed cancellation authority: no President or other executive official should make any decision for inclusion or exclusion of items in a special message contingent upon a Members' vote in Congress. The Ryan substitute, as amended, was adopted by voice vote. The Committee then voted 24-10 to report the bill favorably.⁴³

Several amendments offered by minority Members were rejected, generally with a straight party-line vote. Democrats sought to exempt future changes in Social Security, Medicare, and veterans' entitlement programs from possible cancellations under the LLIVA. Democrats also attempted unsuccessfully to restore pay-as-you-go budget rules, to strengthen requirements for earmark disclosures, and to facilitate enforcement of the three-day lay-over rule for appropriations bills before floor votes.

On June 15, the House Rules Committee met to markup H.R. 4890 and voted 8-4 to approve a substitute amendment containing the same version as approved by the Budget Committee.⁴⁴ Several changes in the substitute version addressed concerns with the bill as introduced. For example, in response to concern expressed over a return to policy deferrals by allowing the President to withhold spending for up to 180 calendar days, the substitute would allow the President to withhold funds for a maximum of 90 calendar days (an initial 45 day period, which could be extended for another 45 days). Submission of special rescission or cancellation messages by the President would occur only within 45 days of enactment of the measure, and the President would be limited to submission of five special messages for each regular act and 10 messages for

⁴¹ Hearing testimony available electronically at http://www.rules.house.gov/legbudg/hearings/lineitemveto/109_lpb_lineitemveto_index.html.

⁴² Both hearings available electronically at <http://www.gpoaccess.gov/congress/house/budget/index.html>.

⁴³ See U.S. Congress, House Committee on the Budget, *Legislative Line Item Veto Act of 2006*, report to accompany H.R. 4890, 109th Cong., 2nd sess., H.Rept. 109-505, part 1 (Washington: GPO, 2006).

⁴⁴ U.S. Congress, House Committee on Rules, *Legislative Line Item Veto Act of 2006*, report to accompany H.R. 4890, 109th Cong., 2nd sess., H.Rept. 109-505, part 2 (Washington: GPO, 2006).

an omnibus measure. Submission of duplicative proposals in separate messages would be prohibited.

On the other hand, some changes in the substitute version approved by the Budget and Rules Committees, and subsequently by the full House, arguably might be subject to additional critiques. The substitute narrowed the definition of a targeted tax benefit to a revenue-losing measure affecting a single beneficiary, with the chairs of the Ways and Means and Finance Committees to identify such provisions. The definition in H.R. 4890 as introduced referred to revenue-losing measures affecting 100 or fewer beneficiaries, as did the Line Item Veto Act of 1996. The bill as introduced, however, would have allowed the President to identify the provisions by default, whereas the 1996 law assigned the duty to the Joint Committee on Taxation. Supporters of the substitute version suggested that it would treat targeted tax benefits comparably to earmarks in appropriations bills. Critics countered that the new definition was too narrow, and that few tax benefits would be subject to cancellation.⁴⁵

On June 21, the House Rules Committee voted to report H.Res. 886, providing for the consideration of H.R. 4890, as amended, favorably by a nonrecord vote.⁴⁶ A manager's amendment offered by Representative Paul Ryan was adopted as a part of the rule for debate. In response to concerns raised by the Transportation and Infrastructure Committee, the amendment added clarifying language that any amounts cancelled which came from a trust fund or special fund would be returned to the funds from which they were originally derived, rather than revert to the General Fund. The following day the House took up H.R. 4890, approved the rule (H.Res. 886) by vote of 228-196, and passed the measure by vote of 247-172.⁴⁷ A motion by Representative Spratt to recommit H.R. 4890 to the Budget Committee with instructions to report it back to the House with an amendment was rejected by vote of 170-249.

Meanwhile, on June 20, 2006, the Senate Budget Committee marked up S. 3521, the Stop Over Spending Act of 2006, an omnibus budget reform measure containing provisions for expedited rescission in Title I.⁴⁸ Minority amendments to exclude Medicare, Social Security, and Veterans' Health Programs from possible rescissions were rejected 10-12 on party-line votes. A manager's amendment was adopted by voice vote, which among other things would prohibit the resubmission of items of direct spending or targeted tax benefits previously rejected by Congress, but would allow the President to resubmit proposed cancellations if Congress failed to complete action on them due to adjournment. Whereupon the committee voted 12-10 to report S. 3521, as amended, favorably. The report to accompany S. 3521 was filed on July 14, 2006.⁴⁹

On June 27, 2006, the President met with some Senators at the White House to discuss the Legislative Line Item Veto bill, and he subsequently urged that the Senate act quickly to approve

⁴⁵ For further discussion of different versions and analysis, see CRS Report RL33517, *Legislative Line Item Veto Act of 2006: Background and Comparison of Versions*, by Virginia A. McMurtry.

⁴⁶ U.S. Congress, House Committee on Rules, *Providing for Consideration of H.R. 4890, Legislative Line Item Veto Act of 2006*, report to accompany H.Res. 886, 109th Cong., 2nd sess., H.Rept. 109-518 (Washington: GPO, 2006).

⁴⁷ "Legislative Line Item Veto Act of 2006," debate and vote in the House, *Congressional Record*, daily edition, vol. 152, June 22, 2006, pp. H4433-41, H4467-93.

⁴⁸ For further discussion of this bill, see CRS Report RL33547, *S. 3521, the Stop Over Spending Act of 2006: A Brief Summary*, by Bill Heniff Jr.

⁴⁹ U.S. Congress, Senate Committee on the Budget, *The Stop Over Spending Act of 2006*, report to accompany S. 3521, 109th Cong., 2nd sess., S.Rept. 109-283 (Washington: GPO, 2006).

such a measure.⁵⁰ Despite the White House lobbying effort, press accounts questioned the likelihood of further Senate action in the 109th Congress. As reported in a story on July 20, 2006, "Senate Budget Chairman Judd Gregg, R-NH, all but pronounced the White House's item veto proposal dead for the year, telling reporters that the Bush Administration had not worked aggressively enough to round up the votes."⁵¹ According to a similar story appearing the same day:

Senate Budget Chairman Judd Gregg, R-NH, conceded this week that his budget overhaul package (S. 3521), which includes a sunset commission, line-item rescission authority and other budget enforcement measures has little chance of passage. Supporters have been unable to overcome Democratic opposition and a reluctance among some Republicans to address it in an election year.⁵²

In addition to the alternative of possible action on S. 3521, the Senate could have chosen to consider a stand alone item veto measure, such as H.R. 4890, as passed by the House, or S. 2381. A news story published shortly before Congress departed for the August recess suggested that the issue remained an open question: "Senate Majority Leader Bill Frist, R-TN, has made no decisions about timing or which [line item rescission measure] to bring up, and is taking a wait-and-see approach to the White House lobbying effort."⁵³ None of these bills, however, saw floor action in the Senate before the 109th Congress adjourned.

Measures Reported in the 109th Congress

H.R. 4890 (Paul Ryan)/S. 2381(Frist). Legislative Line Item Veto Act of 2006. Amends the ICA of 1974 to provide for expedited consideration of certain rescissions of budget authority or cancellation of targeted tax benefits proposed by the President in special messages. Requires any rescinded discretionary budget authority or items of direct spending to be dedicated to deficit reduction. Grants the President authority to withhold funds proposed for rescission or to suspend execution of direct spending and targeted tax benefits. Both bills introduced on March 7, 2006. H.R. 4890 referred jointly to Committees on Budget and on Rules; S. 2381 referred to Budget Committee. Reported favorably, as amended, by House Budget Committee on June 16 (H.Rept. 109-505 Part 1), and by Rules Committee on June 19, 2006 (H.Rept. 109-505 Part 2). Passed House, as amended, by vote of 247-172 on June 22, 2006.

S. 3521 (Gregg). Stop Over Spending Act of 2006. An omnibus budget reform bill. Title I, the Legislative Line Item Veto Act, amends the ICA of 1974 to provide for expedited consideration of certain rescissions of budget authority or cancellation of targeted tax benefits proposed by the President. Introduced on June 15, 2006; referred to the Budget Committee. Committee voted 21-10 to report bill, as amended, favorably on June 20, 2006. The report was filed on July 14, 2006 (S.Rept. 109-283).

⁵⁰ See White House, Office of the Press Secretary, "Fact Sheet: the Legislative Line-Item Veto: Constitutional, Effective, and Bipartisan," June 27, 2006, available electronically at <http://www.whitehouse.gov/news/releases/2006/06/20060627-2.html>.

⁵¹ Peter Cohn, "Chances Poor for Line-Item Veto Legislation," *Congress Daily AM*, July 20, 2006, p. 1.

⁵² Steven T. Dennis, "White House Casts Lifeline to Try to Rescue Line-Item Rescission Authority," *CQToday*, June 20, 2006, p. 9.

⁵³ Peter Cohn, "Portman Upbeat on Line Item Veto But 60 Votes Still an Elusive Target," *Congress DailyAM*, July 26, 2006, p. 15.

Developments in the 110th Congress

Early in the 110th Congress, line item veto measures received Senate floor consideration. On January 10, 2007, Senator Judd Gregg introduced “The Second Look at Wasteful Spending Act of 2007”⁵⁴ as an amendment (S.Amdt. 17 to S.Amdt. 3 to S. 1) to the Legislative Transparency and Accountability Act of 2007, an ethics and lobbying reform bill. According to Senator Gregg, the language in S.Amdt. 17 was similar to the expedited rescission provisions contained in a Democratic amendment, known as the Daschle substitute, offered in 1995 during Senate consideration of the Line Item Veto Act of 1996.⁵⁵ The Bush Administration went on record in support of S.Amdt. 17: “The Administration strongly supports Senator Gregg’s legislative line item veto amendment—an initiative that is consistent with the President’s goals.”⁵⁶

S.Amdt. 17 would have provided for expedited consideration of certain rescissions of discretionary or new mandatory spending or cancellation of targeted tax benefits proposed in special messages from the President. The President could submit up to four rescission packages a year (once with the Budget and three other times at the President’s choosing). The President could withhold funding contained in a special message for up to 45 days. The new authority would expire in four years.

At one point, it appeared that the ethics and lobbying reform measure might become stalled, with the minority leader insisting on a vote on the Gregg amendment before proceeding to final action on S. 1.⁵⁷ An agreement was worked out, however, between the majority leader and the minority leader, with a promise of a vote on the line item veto amendment during debate on the minimum wage bill (H.R. 2) the following week. On January 18, 2007, S.Amdt. 17 was withdrawn, and S. 1 passed by vote of 96-2.⁵⁸

In accordance with the leadership agreement, Senator Gregg filed another amendment (S.Amdt. 101 to H.R. 2) on January 22, 2007, and two hours of floor debate on the line item veto measure ensued.⁵⁹ Senator Gregg noted “one major change” in provisions from the previous S.Amdt. 17 incorporated into S.Amdt. 101: addition of the right to strike. During consideration of a rescission package proposed by the President, a Senator, with the support of 11 others, could move to strike one or more of the rescissions included in the bill; in other words, Congress could amend the President’s proposal by deleting selected items. Senator Gregg suggested that this change brought

⁵⁴ For the text of S.Amdt. 17, see *Congressional Record*, daily edition, vol. 153, Jan. 10, 2007, pp. S397-S399. For initial debate on S.Amdt. 17, see *ibid.*, pp. S336-S341.

⁵⁵ See “Daschle (and Others) Amendment No. 348,” *Congressional Record*, daily edition, vol. 141, Mar. 21, 1995, pp. S4281-S4283.

⁵⁶ “Administration Supports Legislative Line Item Veto Amendment to Senate Bill,” press release from Office of Management and Budget, Jan. 10, 2007.

⁵⁷ “Senate Debate on Reform Measure Stalls Over Amendment to Provide Line-Item Veto,” *Daily Report for Executives*, Jan. 18, 2007.

⁵⁸ “Legislative Transparency and Accountability Act of 2007,” *Congressional Record*, daily edition, vol. 153, Jan. 18, 2007, p. S746.

⁵⁹ For text of S.Amdt. 101, see *Congressional Record*, daily edition, vol. 153, Jan. 22, 2007, pp. S863-S866.

S.Amdt. 101 even more in line with the Daschle substitute in 1995. He also observed that several of the 20 cosponsors of the previous Daschle amendment were still in the Senate.⁶⁰

Senator Kent Conrad, chair of the Budget Committee, suggested that the two amendments differed in important respects. The Gregg amendment would have allowed the President to propose rescinding items of new direct spending in programs such as Medicare, whereas the Daschle amendment did not cover such mandatory spending. The Gregg amendment would have permitted the President to propose rescissions from multiple bills in one rescission package whereas the Daschle amendment would have required that a presidential rescission package cover just one bill. According to Senator Conrad, this latter arrangement would give the President less leverage over an individual member.⁶¹

Debate on S.Amdt. 101 resumed on January 24, 2007. A vote to invoke cloture on the line item veto amendment failed to attain the necessary 60 votes (49-48).⁶² The amendment was subsequently set aside, and formally withdrawn on January 31.

In his budget submission for FY2008 transmitted on February 5, 2007, President Bush once again called for enactment of a line item veto mechanism, such as the Administration's proposal from March 2006, that "would withstand constitutional challenge."⁶³

Expedited rescission bills were also introduced in the House in the 110th Congress (see below). On the same day as the cloture motion on the Gregg line item veto proposal failed in the Senate, Representative Paul Ryan, ranking Republican on the House Budget Committee, along with 83 cosponsors, introduced H.R. 689, the Legislative Line Item Veto Act of 2007. H.R. 689 was nearly identical to H.R. 4890 as passed by the House in the 109th Congress.

On April 23, 2007, companion bills titled the Congressional Accountability and Line-Item Veto Act were introduced as H.R. 1998 by Representative Paul Ryan, and as S. 1186 by Senator Russell Feingold. In his introductory remarks, Senator Feingold sought to differentiate this measure from previous bills, noting the following:

There have been a number of so-called line-item veto proposals offered in the past several years. But the measure Congressman Ryan and I propose today is unique in that it specifically targets the very items that every line-item veto proponent cites when promoting a particular measure, namely earmarks. When President Bush asked for this kind of authority, the examples he gave when citing wasteful spending he wanted to target were congressional earmarks.⁶⁴

The universe of items subject to rescission or cancellation by the President in S. 1186 showed noteworthy differences from those contained in the 109th Congress bills, as passed by the House (H.R. 4890) and reported in the Senate (S. 3521, Title I). Instead of allowing the President to propose rescission of any amount of discretionary spending in appropriations acts, et al. (as did the 109th bills), in H.R. 1998/S. 1186 the newly expedited rescission authority would have only

⁶⁰ Ibid., pp. S792-S793.

⁶¹ Ibid., pp. S797-S798.

⁶² *Congressional Record*, daily edition, vol. 153, Jan. 24, 2007, p. S746.

⁶³ U.S. Office of Management and Budget, *Fiscal Year 2008 Analytical Perspectives* (Washington: GPO, 2007), p. 219.

⁶⁴ Remarks by Senator Feingold accompanying the introduction of S. 1186, *Congressional Record*, daily edition, vol. 153, April 23, 2007, p. S4852.

applied to “congressional earmarks” (as defined in the bill). The provisions regarding the cancellation of limited tax benefits seen in H.R. 1998/S. 1186 reflected language both from the House-passed bill (chairmen of Ways and Means and Finance Committees to identify them) and Senate-reported version (applicable to any revenue-losing provisions affecting a single or limited group). Most significantly, perhaps, under H.R. 1998/S. 1186, the expedited rescission authority would have covered no mandatory spending, but in a departure from provisions in the bills receiving action in the 109th Congress, would have applied to limited tariff benefits.

The 110th Congress bills, H.R. 1998 and S. 1186, had some provisions similar to those seen in one or more bills from the 109th Congress. For example, language in H.R. 1998/S. 1186 regarding the relationship with the ICA paralleled that in the House-passed version of H.R. 4890, 109th Congress, as did the language regarding seriatim rescissions, abuse of the proposed cancellation authority, and using any savings for deficit reduction. The expedited congressional procedures in the 109th, compared with the 110th, bills are virtually the same.

In most cases, when provisions in H.R. 1998/S. 1186 differed from those in the 109th Congress bills, the new features served to further confine the boundaries of the additional rescission authority to be granted the President. The deadline for submission of special rescissions or cancellation messages under H.R. 1998/S. 1186 would have been within 30 days of enactment, compared to 45 days in the House-passed bill in the 109th Congress and one year in the Senate-reported bill (S. 3521, Title I). In a similar manner, S. 1186 would have set a limit of one special message for each act, except for an omnibus budget reconciliation or appropriations measure when two special messages would have been allowed.

On the other hand, stipulations regarding deferrals (withholding of spending) by the President in S. 1186 appeared to be less restrictive than those found in the House-passed and Senate-reported versions in the 109th Congress. Both H.R. 4890 as passed by the House and S. 3521 as reported, allowed withholding for a period not to exceed 45 calendar days. S. 1186 would have permitted the President to withhold funding for designated earmarks or suspend execution of limited tax or tariff benefits for a period of 45 calendar days of continuous session.⁶⁵ In addition, S. 1186 would have allowed the extension of the withholding for another 45-day period if the President submitted a supplemental message between days 40 and 45 in the original period. Under the ICA, the President likewise may withhold funds included in a rescission request for 45 calendar days of continuous session, which often equals 60 or more calendar days. Under the provisions in H.R. 1998/S. 1186, the President could conceivably have withheld funds for 100 days or longer.

As noted already, the original Administration bill in 2006 allowed the President to withhold funds for 180 calendar days. In 2006, some contended that the 180-day withholding mechanism arguably might be viewed as sanctioning the return of policy deferrals, originally provided for in the ICA, subject to a one-house veto, but invalidated by the *Chadha* and *New Haven* decisions, as well as the statutory provisions in P.L. 100-119.⁶⁶ The extension of the withholding period in H.R.

⁶⁵ S. 1186 contains a definition for “calendar day” as “a standard 24-hour period beginning at midnight,” but does not define “calendar day of continuous session.” There is a definition of the “prescribed 45 day period” in the ICA, however, which stipulates “Continuity of a session of the Congress shall be considered as broken only by an adjournment of the Congress sine die, and the days on which either House is not in session because of an adjournment of more than 3 days to a day certain shall be excluded from the computation of the 45-day period.” P.L. 93-344, Sect. 101(5). The phrase “calendar days of continuous session” generally means that days falling in recesses longer than three days are not counted.

⁶⁶ For further discussion of policy deferrals, see CRS Issue Brief IB89148, available from author upon request. For further discussion of possible constitutional issues, see CRS Report RL33365, *Line Item Veto: A Constitutional* (continued...)

1998/S. 1186 conceivably to over 100 days, compared with the 45-calendar-day period in the House-passed and Senate-reported bills, might arguably be appraised as representing a de facto return to policy deferrals.

Two constitutional amendment proposals were introduced in the 110th Congress. H.J.Res. 38 would have allowed the President to decline to approve any dollar amount of discretionary budget authority, any item of new direct spending, or any tax benefit. This coverage was similar to that seen previously in the Line Item Veto Act of 1996. S.J.Res. 27 would have allowed the President to reduce or disapprove any appropriation in a measure presented to him; after so “amending” the measure, the President may have signed the legislation as modified into law.

Measures Introduced in the 110th Congress

H.R. 595 (Mark Udall and Paul Ryan). Stimulating Leadership in Limiting Expenditures Act of 2006. Amends the ICA to provide for expedited consideration of certain presidential proposals for rescission of budget authority contained in appropriation acts. Introduced on January 19, 2007; jointly referred to Committees on Budget and on Rules.

H.R. 689 (Paul Ryan et al.). Legislative Line Item Veto Act of 2007. Amends the ICA of 1974 to provide for expedited consideration of certain rescissions of discretionary budget authority or cancellation of an item of new direct spending, limited tariff benefit, or targeted tax benefits proposed by the President in a special message. Dedicates any savings only to deficit reduction or increase of a surplus. Introduced on January 24, 2007; jointly referred to Committees on Budget and on Rules.

H.R. 1375 (Buchanan). Earmark Accountability and Reform Act of 2007. Amends the ICA of 1974 to provide for expedited consideration of certain rescissions of discretionary budget authority or cancellation of an item of new direct spending or targeted tax benefit proposed by the President in a special message. Dedicates any cancellation only to deficit reduction or increase of a surplus. Amends House Rules to provide that any earmark not contained in House- or Senate-passed versions be deemed out of scope in conference. Introduced on March 7, 2007; referred jointly to Committees on Budget and on Rules.

H.R. 1998 (Paul Ryan). Congressional Accountability and Line-Item Veto Act. Amends the ICA of 1974 to authorize the President to propose in a special message the repeal of any congressional earmark or the cancellation of any limited tariff benefit or targeted tax benefit. Provides expedited procedures for congressional consideration of the proposals contained in special messages. Dedicates any savings from a repeal or cancellation only to deficit reduction or increase of a surplus. Introduced on April 23, 2007; referred jointly to Committees on Budget and on Rules.

H.R. 2084 (Hensarling). Family Budget Protection Act. Omnibus budget reform bill. Section 311 establishes expedited procedures for congressional consideration of certain rescission proposals from the President. Similar expedited rescission provisions were considered by the House in 2004 and rejected by vote of 174-237. Introduced on May 1, 2007; referred to the Committee on the Budget and in addition to the Committees on Rules, Ways and Means, Appropriations, and

(...continued)

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Government Reform for consideration of those provisions falling within their respective jurisdictions.

H.J.Res. 38 (Platts). Constitutional amendment. Allows the President to decline to approve in whole any dollar amount of discretionary budget authority, any item of new direct spending, or any tax benefit. Introduced on February 27, 2007; referred to the Judiciary Committee.

S. 1186 (Feingold). Congressional Accountability and Line-Item Veto Act. Companion bill to H.R. 1998 (see above). Introduced on April 23, 2007; referred to the Budget Committee.

S.J.Res. 27 (Dole). Constitutional amendment. Allows the President to reduce or disapprove any appropriation in any bill, order, resolution, or vote which is presented to him. Introduced on December 11, 2007; referred to the Judiciary Committee.

Developments During the 111th Congress

Actions Taken in Congress

On March 4, 2009, the Congressional Accountability and Line-Item Veto Act was reintroduced in the 111th Congress. In the Senate, S. 524 was cosponsored by Senators Feingold and McCain, and in the House H.R. 1294 was introduced by Representatives Paul Ryan and Mark Kirk.

Senator Gregg and cosponsor Senator Lieberman introduced S. 640, the Second Look at Wasteful Spending Act of 2009, on March 19, 2009. S. 640 is similar to a bill in the 109th Congress, S. 3521 (Title I) as reported by the Senate Budget Committee in 2006 (then chaired by Senator Gregg). Some provisions in the earlier bill, however, appear in modified form in S. 640. For example, with respect to limited tax benefit provisions that the President would be able to propose for cancellation, S. 3521 in the 109th Congress stipulated that the Joint Committee on Taxation was to identify such provisions, while S. 640 is silent regarding the identification function. There are also some provisions in S. 640 that were not included in S. 3521, 109th Congress. For example, a new section in S. 640 contains expedited provisions for deliberations by a conference committee.

Senator Carper, along with 20 cosponsors, introduced S. 907, the “Budget Enforcement Legislative Tool Act of 2009,” on April 28, 2009. This bill is similar to one introduced in the 102nd Congress (H.R. 2164) by then Representative Carper with over 200 cosponsors. The House passed H.R. 2164 by a vote of 312-97, under a suspension of the rules, on October 3, 1992.⁶⁷ This constituted the first time an expanded rescission bill received favorable floor action in either chamber.⁶⁸

The Senate Subcommittee on Federal Financial Management, Government Information, Federal Services, and International Security, on December 16, 2009, held a hearing on “Tools to Combat

⁶⁷ Speaker pro tempore, “Expedited Consideration of Proposed Rescissions Act of 1991,” House floor action, *Congressional Record*, vol. 138, part 21 (October 3, 1992), pp. 3015-3016.

⁶⁸ CRS Report RL30223, *Presidential Rescission Authority: Efforts to Modify the 1974 Framework*, by Virginia A. McMurtry, p.8.

Deficits and Waste: Expedited Rescission Authority,” and considered S. 524, S. 640, and S. 907. Witnesses included Senator Feingold, and staff from the Congressional Research Service, the Government Accountability Office, the National Governors Association, the Concord Coalition, and Citizens Against Government Waste.⁶⁹

Expedited Rescission and the Obama Administration

In his budget submissions for FY 2010 and FY2011, President Obama endorsed an “expedited process for considering rescission requests.” According to a FY2011 budget volume, “There would be a benefit to establishing the option of an additional procedure [besides that in the ICA] in those cases where the President finds a need for a rapid, up-or-down vote on a package of rescission proposals.” Proposals for rescissions under the expedited procedures could “only reduce or eliminate funding for budget accounts, programs, projects, or activities.”⁷⁰

On May 24, 2010, OMB Director Peter Orzag announced the transmittal of an administration draft bill to Congress, the Reduce Unnecessary Spending Act of 2010, which would provide expedited rescission procedures for consideration of certain requests from the President. Within a short time period after signing a bill into law, the President would be able to submit a package of rescissions for reducing or eliminating discretionary appropriations or non-entitlement mandatory spending. Such proposed rescissions from the President would be considered as a group and would be subject to expedited procedures in Congress, designed to ensure an up-or-down vote on the package.

Measures Introduced in the 111th Congress

H.R. 1294 (Paul Ryan et al.). Congressional Accountability and Line-Item Veto Act. Amends the ICA of 1974 to authorize the President to propose in a special message the repeal of any congressional earmark or the cancellation of any limited tariff benefit or targeted tax benefit. Provides expedited procedures for congressional consideration of the proposals contained in such a special message. Dedicates any savings from a repeal or cancellation only to deficit reduction or increase of a surplus. Introduced on March 4, 2009; referred to Committees on Budget and on Rules.

H.R. 1390 (Buchanan). Earmark Accountability and Reform Act of 2009. Amends the ICA of 1974 to provide for expedited consideration of certain rescissions of discretionary budget authority or cancellation of an item of new direct spending or targeted tax benefit proposed by the President in a special message. Dedicates any cancellation only to deficit reduction or increase of a surplus. Amends House Rules to provide that any earmark not contained in House- or Senate-passed versions be deemed out of scope in conference. Introduced on March 9, 2009; referred to Committees on Budget and on Rules.

⁶⁹ For statements at the hearing, see links from http://hsgac.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=34e3c205-9016-4269-be41-a27ec7e90a8c.

⁷⁰ Office of Management and Budget, *Analytical Perspectives, Budget of the U.S. Government Fiscal Year 2011*, Washington, DC, February 2010, p. 150, <http://www.whitehouse.gov/omb/budget/fy2011/assets/concepts.pdf>.

H.R. 3268 (Reichert et al.). Earmark Transparency and Accountability Reform Act, Title II, Earmark Rescission Authority. Amends the ICA of 1974 to authorize the President to propose in a special message the repeal of any congressional earmark or the cancellation of any limited tariff benefit or targeted tax benefit. Provides expedited procedures for congressional consideration of the proposals contained in such special messages. Dedicates any savings from a repeal or cancellation only to deficit reduction or increase of a surplus. Authorizes temporary presidential authority to withhold congressional earmarks and to suspend any limited tariff or targeted tax benefit. Requires the Comptroller General to develop and implement a systematic process to audit and report to Congress annually on programs, projects, and activities funded through earmarks. Introduced on July 20, 2009; referred to House committees on Rules, Standards of Official Conduct, Judiciary, and Oversight and Reform.

H.R. 3964 (Hensarling et al.). Spending, Deficit, and Debt Control Act of 2009. Title II, subtitle B: Legislative Line-Item Veto Act of 2009. Amends the ICA of 1974 to authorize the President to propose to Congress in a special message the cancellation of any item of discretionary spending, item of direct spending, or limited tariff benefit or targeted tax benefit. Provides expedited procedures for congressional consideration of the proposals contained in such special messages. Dedicates any savings from a repeal or cancellation only to deficit reduction or increase of a surplus. Authorizes the President to withhold discretionary budget authority temporarily from obligation (or to defer), or to suspend temporarily direct spending, a limited tariff, or targeted tax benefit. Requires the Comptroller General to report to Congress when any item of discretionary spending is not made available or any item of direct spending, limited tariff benefit, or targeted tax benefit continues to be suspended after the deferral period has expired. Introduced on October 29, 2009; referred to the Committee on the Budget, and in addition to the Committees on Rules, Appropriations, Oversight and Government Reform, and Ways and Means, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

H.R. 4921 (Minnick et al.). Budget Enforcement Legislative Tool Act of 2010. Companion bill to S. 907 (see below). Introduced on March 24, 2010; referred to the Budget Committee and in addition to the Rules Committee, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned.

H.J.Res. 15 (Platts). Constitutional amendment. Allows the President to decline to approve in whole any dollar amount of discretionary budget authority, any item of new direct spending, or any limited tax benefit. Introduced on January 8, 2009; referred to the Judiciary Committee.

S. 524 (Feingold and McCain). Congressional Accountability and Line-Item Veto Act of 2009. Companion bill to H.R. 1294 (see above). Introduced on March 4, 2009; referred to the Budget Committee.

S. 640 (Gregg and Lieberman). Second Look at Wasteful Spending Act of 2009. Amends the ICA of 1974 to authorize the President to propose rescission of dollar amounts of discretionary budget authority, items of direct spending, or cancellation of targeted tax benefits in a special message to Congress. Provides expedited procedures for consideration of the draft bill accompanying the special message from the President. Introduced on March 19, 2009; referred to the Budget Committee. Similar to provisions in S. 3521, 109th Congress, reported favorably by the Budget Committee on (S.Rept. 109-283).

S. 907 (Carper et al.). Budget Enforcement Legislative Tool Act of 2009. Amends the ICA of 1974 to authorize the President to propose certain rescissions of discretionary budget authority in a special message to Congress within three days of enactment of the appropriations act. Establishes expedited procedures for congressional consideration of a draft measure (to accompany each special message), approving of the requested rescissions. Introduced on April 28, 2009; referred to the Budget Committee.

S. 1808 (Feingold). Control Spending Now Act. Title I, subpart B: Legislative Line Item Veto Act of 2009. Congressional Accountability and Line Item Veto Act of 2009. Amends the ICA of 1974 to authorize the President to propose the repeal of any congressional earmark or the cancellation (line item veto) of any limited tariff or targeted tax benefit. Dedicates any such repeal or cancellation only to deficit reduction or increase of a surplus. Prescribes procedures for expedited consideration in Congress for such proposals. Authorizes the President temporarily to withhold congressional earmarks from obligation or suspend a limited tariff or targeted tax benefit. Requires the Comptroller General to report to Congress when any item of discretionary spending is not made available or any item of direct spending, limited tariff benefit, or targeted tax benefit continues to be suspended after the deferral period has expired. Expresses the sense of Congress on abuse of proposed repeals and cancellations. Introduced on October 20, 2009; referred to the Committee on Finance.

S. 3026 (Bayh and McCain). Fiscal Freeze Act of 2010. Title I, Congressional Accountability and Line-Item Veto Act of 2010. This title of the omnibus budget reform measure is virtually the same as H.R. 1294 and S. 524. Introduced on February 23, 2010; referred to the Budget Committee.

S.J.Res. 22 (LeMieux). Constitutional amendment. Includes provisions relative to requiring a balanced federal budget and granting the President the power to exercise a line-item veto. Introduced on December 15, 2009; referred to the Judiciary Committee.

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**STATEMENT OF ALAN B. MORRISON
SUBMITTED TO THE SUBCOMMITTEE ON THE CONSTITUTION
COMMITTEE ON THE JUDICIARY, UNITED STATE SENATE**

REGARDING

REDUCE UNNECESSARY SPENDING ACT OF 2010

Mr. Chairman, members of the Subcommittee. I am pleased to submit this statement regarding the constitutionality of the Reduce Unnecessary Spending Act of 2010, as proposed by President Obama on May 24, 2010, (the "2010 Act"). I am currently the Lerner Family Associate Dean for Public Interest and Public Service Law at the George Washington University Law School. More importantly for these purposes, I was principal counsel in a number of separation of powers cases in the Supreme Court, including having argued *Raines v. Byrd*, 521 U.S. 811 (1997), the first challenge to the constitutionality of the Line Item Veto Act, in which the lower court's judgment that the Act was unconstitutional was reversed and the case dismissed because the Court concluded that Congress could not constitutionally confer standing on Members of Congress to challenge the constitutionality of that Act.

I have reviewed the text of the 2010 Act and concluded that it does not contain any of the flaws that led the Court, one year after *Raines* was dismissed, to declare the Line Item Veto Act unconstitutional in *Clinton v. City of New York*, 524 U.S. 417 (1988). In contrast to the Line Item Veto Act, the 2010 Act does not permit the President to rescind any appropriated funds unless he obtains concurrence of both Houses of Congress and then signs into law a bill embodying that concurrence. The result is every bit as

much of a law as is the law that appropriated the funds that the President proposes to rescind and full complies with the Presentment Clause of the Constitution.

The main advantage to the President from the 2010 Act is that it puts in place in Congress procedures that will ensure a prompt up or down vote on the proposed rescission as a whole. The 2010 Act also contains appropriate protections that will guard against overreaching or misuse by the President of his limited authority by enabling the appropriate persons in Congress, using regular procedures, to strip from the President's proposal any items that do not comply with the terms of the 2010 Act. If the President believes that these deletions were in error, he can veto the bill, in which case none of the rescissions will become law. Unlike the Line Item Veto Act, Congress is not required to obtain a two-thirds majority in both Houses to prevent the President's rescissions from becoming effective. Rather, he must obtain approval of both Houses or else the appropriated items remain in effect as enacted by Congress.

The only provision that might be seen to raise any constitutional question is section 1025 that allows OMB to temporarily withhold funds that have been proposed for rescission, even though Congress has not yet approved the President's request. Section 1025 contains reasonable time and other limits that prevent the misuse of this authority, which seems necessary to assure that money is not spent that Congress would agree should be rescinded. Those limits could be tightened if Congress thought that was desirable, but I see no constitutional issue in Congress approving a process that includes a short term temporary withholding of money that is requested to be rescinded.

There is one issue that is not a constitutional one that I wish to point out to the Committee. The Line Item Veto Act was applicable not only to appropriated funds but

also to certain tax expenditures, but the 2010 Act does not cover any tax expenditures. As this Committee is aware, our budget deficit is significantly increased every year by tax revenues that are not collected, as the Line Item Veto Act recognized. Some such expenditures, like appropriated funds and even earmarks, are for appropriate purposes, but others are of questionable value. If the 2010 Act proves effective, I would hope that in several years it would be amended to include tax expenditures in its purview, although the process would have to be modified to account for the differences in the manner in which funds are directly appropriated and tax expenditures become law. If that is not done, there will be even greater incentives for special interests to use the tax code for their personal gain than now exists since the 2010 Act will reduce the availability of earmarks to benefit private, rather than public interests.

If the committee has any questions about the 2010 Act or my statement, or if I can be of any further assistance, please do not hesitate to contact me.

STATEMENT FOR THE RECORD**THE HONORABLE PAUL RYAN,****SENATE SUBCOMMITTEE ON THE CONSTITUTION****HEARING ON THE LEGALITY AND EFFICACY OF LINE-ITEM VETO PROPOSALS****MAY 26, 2010*****Introduction***

Chairman Feingold, thank you for holding this hearing and inviting me to testify on the legislative line item veto. As you know, I have worked to secure enactment of a constitutional version of the line-item veto for the past several years. On June 22, 2006, H.R. 4890, the "Legislative Line Item Veto Act of 2006" passed by a bipartisan vote of 247-142. I have proposed several other constitutional versions of the legislative line-item veto including H.R. 1998 and H.R. 689 in the 110th Congress, and H.R. 1294 in the 111th Congress. Both H.R. 1998 and H.R. 1294 have received bipartisan, bicameral support in Congress. During the recent House GOP retreat in Baltimore, I called on President Obama to support a constitutional version of the line-item veto and I am pleased that he has done so, though I do have some substantive concerns with his current proposal.

I appreciate the renewed interest that the legislative line-item veto is receiving by the President and this subcommittee. It is more important than ever that we pursue every possible way to get spending under control and reduce our budget deficits and debt. We are currently running a \$1.5 trillion deficit and massive deficits are projected to continue as far as the eye can see. Washington's fiscal recklessness will result in a crushing burden of debt for our children and grandchildren – and it is imperative that we chart a dramatically new direction today so the next generation can have a prosperous tomorrow. While the legislative line-item veto is an

important step towards instituting an ethic of fiscal responsibility in Congress, it should not and cannot be taken as a cure for our debt problem. Correcting the Federal budget's structural imbalance will require broad-based entitlement reform, as the explosive growth of Medicare, Medicaid, and Social Security are the elephants in the room when it comes to our debt crisis. This tool does not apply to existing law and is not capable of addressing the \$43 trillion in unfunded liabilities from Social Security and Medicare alone. As a result, we must be realistic about what a line-item veto can actually achieve – as I believe it to be an important, but relatively modest budgetary tool to target wasteful and unnecessary spending from larger spending bills. I am hopeful that this budget tool can be used to challenge and change Washington's culture of spending, so that our elected officials can begin to regain the trust of the American people and work together to fix our fiscal crisis.

The Problem

The amount of pork-barrel spending included in the federal budget has increasingly been recognized as a problem by both the Democratic Party and the Republican Party. For example, in the House earlier this year, the Republican Conference instituted a moratorium on all earmarks. The Democratic Caucus took a much smaller step, but did at least institute a moratorium on for-profit earmarks. These are positive steps toward reducing irresponsible earmarks. However, Congress must remain vigilant in its stewardship of taxpayers' dollars. In the fiscal year 2010 (FY2010), Citizens Against Government Waste highlighted 9,129 pork-barrel spending projects costing taxpayers approximately \$16.5 billion. Many of these pork-barrel spending projects are quietly inserted into the conference reports of appropriations bills where Congress is unable to eliminate them using the amendment process. In fact, the only time that Congress actually votes on these items is during an up-or-down vote on the entire

conference report, which includes spending for many essential government programs in addition to the pork-barrel earmarks. Also, many earmarks are in report language accompanying legislation and are not readily apparent or easily removed. Congress often sends to the President meritorious appropriations bills despite the inclusion of wasteful spending items. Unfortunately, the current tools at the President's disposal do not enable him to easily combat these wasteful spending items. Even if the President identifies numerous pork-barrel projects in an appropriations bill, he is unlikely to use his veto power because it must be applied to the bill as a whole and cannot be used to target individual items. This places the President in the same dilemma as Members of Congress. Does he veto an entire spending bill because of a few items of pork when this action may jeopardize funding for our troops, homeland security, or other meritorious priorities?

The President's ability to propose the rescission of wasteful spending items under the "Impoundment Control Act of 1974" has been equally ineffective at eliminating wasteful spending items. The problem with the current authority is that it does not include any mechanism to guarantee congressional consideration of a rescission request and many Presidential rescissions are ignored by the Congress. In fact, during the 1980s, Congress routinely ignored President Reagan's rescission requests, failing to act on over \$25 billion in requests that were made by his Administration. It appears that Congress has only used the rescission procedures in the Budget Act once over the past 36 years and in that instance the President never got a vote on all of his proposals.

Summary of Legislative Line-Item Veto Legislation

I have introduced several bills that provide the President with constitutional versions of the line-item veto. In the 109th Congress, I introduced H.R. 4890, the "Legislative Line-Item

Veto Act of 2006". This bill passed the House of Representatives by a bipartisan vote of 247-172 on June 22, 2006. H.R. 4890 would have allowed the President to propose the elimination of wasteful spending items subject to congressional approval under an expedited process. H.R. 4890 would have given the President the ability to put on hold wasteful discretionary spending, wasteful new mandatory spending, or new special-interest tax breaks after signing a bill into law. The President could then ask Congress to rescind these specific items. The requirement that both the House and Senate approve all proposed rescissions means that Congress will continue to control the power of the purse and will have the final word when it comes to spending matters. However, unlike the current rescission authority vested in the President under the "Impoundment Control Act of 1974", the bill also includes a mechanism that would require congressional action in an expedited time frame.

H.R. 4890 is similar to H.R. 689, which was introduced in the 110th Congress. This version of the legislative line-item veto was also included in H.R. 3964, the Spending Deficit and Debt Control Act of 2009, introduced by Representative Jeb Hensarling of Texas, of which I am an original cosponsor.

This, Congress, along with the distinguished Chairman, Senator Feingold, I have introduced H.R. 1294, the "Congressional Accountability and Line-Item Veto Act of 2009". H.R. 1294 is more narrowly targeted than H.R. 4890, affecting wasteful spending or special-interest tax breaks that provide a benefit to 10 or fewer beneficiaries. By using a constitutional version of the line-item veto act, the President and Congress will be able to work together to combat wasteful spending and add transparency and accountability to the budget process. This tool will shed light on the earmarking process and allow Congress to vote up or down on the merits of specific projects added to legislation or to conference reports. Not only will this allow

the President and Congress to eliminate wasteful pork-barrel projects, but it will also act as a strong deterrent to the inclusion of questionable projects in the first place. On the other hand, Members who make legitimate appropriations requests should have no problem defending them in front of their colleagues if they are targeted by the President.

The President's Proposal

While I am pleased that the President has proposed a version of the line-item veto, I do have some substantive concerns with the bill he has proposed. First, I am concerned that the President's proposal does not ensure that savings go toward deficit reduction. My legislation includes mechanisms to devote any savings toward deficit reduction. If spending is wasteful, it should not be spent, period. However, the President's proposal contains no deficit reduction requirement. The President's proposal would allow rescinded spending to be spent on other programs. The purpose of the line-item veto is to reduce frivolous spending, not to shuffle spending around.

I am also concerned that the President's proposal only applies toward discretionary budget authority. It is unclear why this tool should only apply to discretionary appropriations, but not to new direct spending as well. This creates a perverse incentive for Members of Congress to actually propose new entitlements in order to evade this process. I do not believe that new direct spending should be exempt from a constitutional version of the line-item veto.

Conclusion

In 2010, the Federal government will run a budget deficit of \$1.5 trillion, with a tidal wave of debt – driven by unsustainable entitlement spending – set to drown the next generation in a sea of red ink. Given our dire fiscal future, it is imperative that we act now to rein in our out-of-control government spending. By providing the President with a scalpel to target wasteful

spending, a constitutional line-item veto is an important first step toward achieving this goal. While supportive of this common sense budget tool, I remain deeply troubled by the dangerous fiscal trajectory exacerbated by this Administration and this Congress. A line-item veto cannot stop Washington's unchecked spending spree and the glaring lack of a budget for the upcoming fiscal year. American families are making tough budgetary decisions; it is shameful their elected officials can't do the same. Congress must earn back the trust of those they serve and tackle our most pressing economic and fiscal challenges.

I look forward to working with the Administration and my colleagues in both parties and both chambers of Congress to chart a new course, rejecting the irresponsible culture of wasteful spending in Washington. This tool is a step in the right direction – but Congress still has miles to go.

